So Ordered.

Dated: March 31, 2023

Rachel M. Blise
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

Cynthia M. Seymore,

Debtor.

Case No. 19-22084-rmb

Chapter 13

DECISION AND ORDER

"[L]iens pass through bankruptcy unaffected." *In re Penrod*, 50 F.3d 459, 461 (7th Cir. 1995). This adage has governed bankruptcy law for over 130 years. *See Dewsnup v. Timm*, 502 U.S. 410, 418 (1992); *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *Long v. Bullard*, 117 U.S. 617, 620-21 (1886). But "the principle that liens pass through bankruptcy unaffected cannot be taken literally," and liens can be affected in some circumstances. *Penrod*, 50 F.3d at 462. The question in this case is whether a creditor's lien can pass through a chapter 13 bankruptcy when the creditor does not receive the payment contemplated in the plan because neither the creditor, nor anyone on its behalf, files a proof of claim. The answer must be yes, and for the following reasons the Court denies the debtor's pending motion to require the secured creditor to release its mortgage lien.

BACKGROUND

The relevant facts are undisputed.[1] The debtor filed a chapter 13 petition on March 15, 2019. The debtor's Schedule A indicated that the debtor owned real property located at 3247-3249 North 27th Street in Milwaukee, Wisconsin (the "Property"). The debtor valued the Property at $12,500. Schedule D indicated that the debtor owed $62,726.47 to Ditech Financial LLC ("Ditech")[2], and that Ditech's claim was secured by the Property.

The debtor proposed a 60-month chapter 13 plan using the Court's local plan form. The first page of the plan notified creditors that "a timely proof of claim **must** be filed in order to receive payments from the trustee under this plan." ECF No. 9 at 1 (emphasis in original). Ditech's claim was listed in section 3.2 of the plan. *Id.* at 3-4. The plan sought to value the Property at $12,500, with the effect that Ditech would receive that amount plus 4.5% interest and the remainder of its claim would be paid pro rata with general unsecured creditors.[3] *Id.* at 4. Section 3.2 also included the following language:

> The holder of any claim listed below as having value in the *Amount of secured claim* column will retain the lien on the property interest of the debtor(s) or the estate(s) until the earlier of:
>
> (a) payment of the underlying debt determined under nonbankruptcy law, or
>
> (b) discharge of the underlying debt under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor.

Id. at 3. Section 5.1 of the plan provided that unsecured creditors would receive $0.00. *Id.* at 5.

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[1] The parties dispute whether the chapter 13 plan was served on the creditor as required by Bankruptcy Rules 3012(b) and 7004. As explained below, that factual dispute is immaterial to the Court's resolution of the debtor's motion.

[2] Counsel for the creditor asserted in its brief that the claim at issue is now held by NewRez LLC d/b/a Shellpoint Mortgage Servicing. The relevant provision of the chapter 13 plan referred to Ditech, and there is no dispute that Ditech held the claim when the plan was filed and confirmed, so the Court refers to the creditor as Ditech.

[3] The Property is not the debtor's principal residence, so Ditech's claim was not immune from modification under § 1322(b)(2).

The chapter 13 trustee recommended confirmation, no other creditor or party in interest objected to confirmation, and an order confirming the plan was entered on November 12, 2019.

Ditech did not file a proof of claim by the claims bar date, and therefore was not entitled to, and did not, receive payments under the chapter 13 plan. On December 29, 2020, the chapter 13 trustee sent a letter to the debtor, a copy of which he also filed on the docket, stating that, based on the claims filed in the case, he was increasing the amount to be paid to general unsecured creditors to 100%. This increased dividend was like the result of Ditech's failure to file a proof of claim, which freed funds for distribution to unsecured creditors.

On June 14, 2022, the trustee filed a notice that he had received all payments due under the plan and that the plan was complete. On July 28, 2022, the trustee filed a final report and account indicating that the debtor had made 38 months of payments and that all general unsecured creditors who filed claims had received 100% of their claims.

On August 11, 2022, the debtor filed a motion asking the Court to order Ditech to release its lien on the Property. The debtor argued that Ditech is bound by the confirmed plan, which provides that Ditech must release its lien at discharge. Ditech objected to the debtor's motion, arguing that Ditech is not bound by the provision requiring release of its lien because it did not receive any payment under the plan. At a hearing on the debtor's motion the Court ordered the parties to submit further briefing and took the matter under advisement.[4]

JURISDICTION

The Court has jurisdiction over the debtor's motion pursuant to 28 U.S.C. § 1334 and the order of reference from the district court pursuant to 28 U.S.C. § 157(a). *See* Order of Reference

[4] As an alternative to release of Ditech's lien, the debtor sought an extension of the deadline to file a proof of claim on Ditech's behalf and permission to modify the plan to pay the late claim. The Court denied these aspects of the debtor's motion during the hearing, *see* ECF No. 70, and the only issue for resolution is whether Ditech must release its lien.

(E.D. Wis. July 10, 1984) (available at www.wied.uscourts.gov/gen-orders/bankruptcy-matters) (last accessed March 31, 2023). This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(K), (O). This decision and order serves as the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

DISCUSSION

Section 501(a) of the Bankruptcy Code provides that a creditor "*may* file a proof of claim." 11 U.S.C. § 501(a) (emphasis added). The plain language of the statute contemplates that a creditor like Ditech is not *required* to file a proof of claim. But is there any consequence for a secured creditor that does not file a proof of claim?

The Seventh Circuit has already answered this question: "A creditor must file a proof of claim in order to participate in Chapter 13 plan distributions. . . . [A] secured creditor who fails to [file a proof of claim] can still enforce its lien through a foreclosure action, even after the debtor receives a discharge." *In re Pajian*, 785 F.3d 1161, 1163 (7th Cir. 2015). "In other words, a secured creditor's lien is largely unaffected by the bankruptcy discharge, regardless of whether the creditor filed a proof of claim." *Id.*; *see also In re Tarnow*, 749 F.2d 464, 465 (7th Cir. 1984) (a secured creditor can "ignore the bankruptcy proceeding and look to the lien for the satisfaction of the debt").

This well-established circuit law would appear to easily resolve this case. Ditech ignored the debtor's bankruptcy proceeding and can therefore look to its lien for satisfaction of the debt. The debtor claims, however, that her confirmed chapter 13 plan alters the general rule and distinguishes this case from Seventh Circuit precedent.

As an initial matter, the parties dispute whether the confirmed plan is binding on Ditech because Ditech claims that the debtor did not serve the plan as required by Rule 7004. *See* Fed. R. Bankr. P. 7004 (a domestic corporation is served by mailing a copy of the document "to the

attention of an officer, a managing or general agent, or to any other agent authority by appointment or by law to receive service of process"). Specifically, Ditech says that the plan was addressed to an individual who was not an officer at Ditech at the time the debtor mailed the plan to him. The debtor responds that publicly available information at the time indicated that the individual was, in fact, the president. The Court need not resolve this factual issue. For purposes of this decision only, the Court has assumed that the plan was properly served on Ditech. Even with that assumption, Ditech is not required to release its lien.

The debtor insists that Ditech is bound by the terms of the confirmed plan, and that upon confirmation the Property vested in her free and clear of Ditech's interest. It is true that under § 1327(a) confirmation of a chapter 13 plan binds the debtor and her creditors to the terms in the plan, and is *res judicata* as to all issues that could have been raised in opposition to confirmation. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269 (2010) (a bankruptcy court's order confirming a chapter 13 plan is a final judgment); 11 U.S.C. § 1327(a) ("The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan."). It is also true that, in general, "confirmation of a plan vests all of the property of the estate in the debtor," and that, unless otherwise provided in the plan, the property vests "free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. § 1327(b), (c). Contrary to the debtor's contention, these canons cannot be blindly applied to enforce a single provision in the chapter 13 plan without considering the rest of the plan.

The debtor focuses on the provision in section 3.2 of the plan that requires creditors treated in that section to release their liens upon the earlier of full payment under non-bankruptcy law or discharge under § 1328. ECF No. 9 at 3. The debtor argues that her case is ripe for

discharge now that she has completed her plan payments, and that the lien must be released once her discharge is entered. But the provision cited by the debtor is just a single part of the entire plan to which the debtor and Ditech were bound. Ditech was bound to file a proof of claim to receive payment, and it was bound to receive just $12,500 on its secured claim if did file a proof of claim. The debtor also had obligations to Ditech under the confirmed plan. She was bound to pay Ditech $12,500 to obtain release of the lien, and she was bound to pay that sum only if a proof of claim was filed. The confirmed plan incorporated all these requirements, with the effect that Ditech was not required to release its lien unless it received $12,500 plus interest in exchange.

The Bankruptcy Appellate Panel for the Sixth Circuit confronted a similar issue in *Matteson v. Bank of America, N.A. (In re Matteson)*, 535 B.R. 156 (B.A.P. 6th Cir. 2015). In that case, the debtors' plan provided for the curing of any default and the maintenance of payments on two mortgages held by Bank of America pursuant to 11 U.S.C. § 1322(b)(5). *Id.* at 158. The plan also provided that creditors were required to file a proof of claim in order to receive payments under the plan. *Id.* Bank of America did not file a proof of claim for either of the mortgages, and the chapter 13 trustee made no payments to Bank of America during the plan term. *Id.* After the plan was completed and the debtors received a discharge, they sought to avoid Bank of America's mortgages because Bank of America had not filed proofs of claim. *Id.* at 160. The bankruptcy court held that by not filing proofs of claim Bank of America waived its right to receive the payments that had been proposed in the debtors' plan. *Id.* Bank of America retained its lien, but the mortgage was deemed current as of the end of the plan term. *Id.*

The Bankruptcy Appellate Panel reversed. It held that "nothing in the Bankruptcy Code, the Rules or the confirmed chapter 13 plan required the Bank to file a proof of claim in order to

preserve its secured status or the balance outstanding on its loans." *Id.* at 163. Bank of America's failure to file a proof of claim affected only its right to receive payments under the chapter 13 plan. *Id.* "This election not to participate in the chapter 13 plan, however, did not result in the Bank's waiver of its right to payments on the debt. To avoid default on the Bank's mortgage loans, the Debtors were still required to service the debt, if not through the plan, then by making payments outside the plan." *Id.* at 164. The court noted that the debtors had an "opportunity to ensure that the plan operated effectively to cure the defaults and pay the debts to the Bank in accordance with the loan documents" because the debtors could have filed a proof of claim on behalf of Bank of America. *Id.*

The *Matteson* case involved a "cure and maintain" plan provision under § 1322(b)(5), but the same principle applies to a plan provision that modifies a secured claim under § 1322(b)(2), as the debtor's plan did with Ditech's claim in this case. In *Covington v. Santander Consumer USA, Inc. (In re Covington)*, No. 11-10027, 2016 WL 7176600 (Bankr. S.D. Ga. Dec. 8, 2016), the debtors' schedules indicated that Santander was owed $11,661.17 and their plan valued the collateral securing Santander's claim at $5,950.00. *Id.* at *1. Santander filed a proof of claim after the claims bar date; the claim was therefore disallowed and Santander received no payments under the chapter 13 plan. *Id.* at *2. The court held that "Santander's in rem rights against the Vehicle pass through and survived the bankruptcy," and the debtor was not entitled to an order requiring Santander to release its lien. *Id.* at *4.

These cases provide support for the notion that Ditech was not obligated to release its lien without receiving the payment contemplated by section 3.2 of the plan. Ditech was bound by the confirmed plan, but so was the debtor. The debtor did not comply with her obligations, so she cannot rely on § 1327(a) to require Ditech to release its lien.

The debtor's reliance on *In re Kitzerow*, 573 B.R. 766 (Bankr. W.D. Wis. 2017), is misplaced. The plan in *Kitzerow* did not include a provision requiring creditors to file a proof of claim to receive payment under the plan. The court held that the confirmed plan bound the parties, and that the creditor should therefore receive the payments contemplated in the plan. *Id.* at 770. Here, in contrast, the plan required Ditech to file a claim to receive payment. The creditor in *Kitzerow* received the value of its lien; Ditech did not. Ditech should not be required to release its lien without compensation for the value of the lien. *See id.* ("Secured creditors are protected by their liens to the extent provided for in the plan. It is well established that secured creditors will not forfeit their liens if they merely fail to file a proof of claim.").

The vesting language in § 1327(c) also does not help the debtor. *See* 11 U.S.C. § 1327(c) (property vests in the debtor at confirmation "free and clear of any claim or interest of any creditor provided for by the plan"). Ditech cites *SouthTrust Bank of Alabama, N.A. v. Thomas (In re Thomas)*, 883 F.2d 991 (1989), in support of its argument that the Property was still encumbered by its lien when it vested in the debtor at confirmation. In *Thomas*, creditor SouthTrust Bank had a security interest in the debtors' mobile home. The debtors' plan provided that they would "pay in full all allowed claims." *Id.* at 992. SouthTrust Bank did not file a proof of claim and therefore did not have an allowed claim so received no payment under the plan. *Id.* at 993. The court rejected the debtors' argument that SouthTrust Bank was bound by the terms of the confirmed plan, and that the mobile home would vest in them free and clear of the bank's lien under § 1327(c). *Id.* at 998. The court reasoned that the plan only provided for allowed claims, and because SouthTrust Bank did not have an allowed claim by virtue of its failure to file a claim, SouthTrust was not a "creditor provided for by the plan" under § 1327(c). *Id.*

Under *Thomas*, when a secured creditor will receive no payment under a chapter 13 plan, and the lien has not been avoided or valued at $0, then the lien survives because the creditor (and the value of its lien) was not "provided for by the plan." *Id.*; *see also Covington*, 2016 WL 7176600, at *3 ("For a secured creditor to be 'provided for' in a chapter 13 plan, it must receive plan distributions through its 'allowed claim.'"); *In re Roberts*, No. 99-80260, 1999 WL 33582103, at *2 (Bankr. C.D. Ill. Aug. 20, 1999) ("[T]he confirmation of the plan acts to extinguish the lien provided that: 1) the lienholder participated in the debtor's bankruptcy case by filing a proof of claim; *and* 2) the property was either 'dealt with' or 'provided for' by the plan.") (emphasis added). Ditech received no payment because no proof of claim was filed, so the Property did not vest in the debtor free and clear of Ditech's lien.

Requiring the creditor to have participated in the case, whether voluntarily by filing a proof of claim or involuntarily by having a proof of claim filed on its behalf, before ordering release of its lien makes sense in the larger bankruptcy scheme. The Bankruptcy Code provides that a creditor's lien is not void "due only to the failure of any entity to file a proof of such claim under section 501." 11 U.S.C. § 506(d)(2); *see also In re Weise*, 455 B.R. 702, 704 (Bankr. E.D. Wis. 2011) ("It is well-established that a secured creditor's failure to file a proof of claim – whether timely, or at all – does not affect the validity of the lien, nor bar the creditor from enforcing a lien after discharge."). The debtor's position would effectively void Ditech's lien, which had a value of at least $12,500, just because Ditech did not file a proof of claim, a result the Bankruptcy Code seems to reject.

Moreover, the debtor's position would grant debtors an incredible windfall for a secured creditor's relatively minor infraction of failing to file a proof of claim. It cannot be that a creditor's failure to file a proof of claim means that the creditor loses the entire value of its lien.

"The destruction of a lien is a disproportionately severe sanction for a default that can hurt only the defaulter. . . If an ordinary plaintiff files a suit barred by the statute of limitations, the sanction is dismissal; it is not to take away his property. And a lien is property." *Tarnow*, 749 F.2d at 466. The confirmed plan informed Ditech that it would not receive payment under the plan if it did not file a proof of claim; it did not inform Ditech that it would lose its lien altogether if it did not file a proof of claim.

A debtor faced with a creditor that, by choice or neglect, declines to participate in distributions under a chapter 13 plan is not left without options. Both the Bankruptcy Code and the Bankruptcy Rules expressly allow the debtor to file a claim on the creditor's behalf and force the creditor to participate. *See* 11 U.S.C. § 501(c) ("If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim."); Fed. R. Bankr. P. 3004 ("If a creditor does not timely file a proof of claim . . ., the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims[.]"). A leading bankruptcy treatise acknowledges that the debtor may need to file a claim to ensure that a secured creditor is paid: "If a chapter 12 or chapter 13 plan is intended to pay a secured claim, and the court requires a secured claim to be filed in order for it to be allowed and paid, the debtor may need to file the secured claim if the secured creditor does not do so." 9 Collier on Bankruptcy ¶ 3004.01 (16th 2023).

When Ditech did not file a proof of claim, the debtor could have filed a claim on its behalf. A proof of claim filed by the debtor would have permitted the trustee to make the payments required by the plan and resulted in the release of the lien once the plan was complete. The debtor did not file a claim, so Ditech was not paid and is not required to release its lien.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that the debtor's motion to require Ditech to release its lien (ECF No. 63) is DENIED.

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