NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-10-1057-KiLPa
	)	
DARRELL R. LANTZY, a/k/a Bud Lantzy and ELIZABETH M. LANTZY,	)	Bk. No. 08-20561-KT
	)	
Debtors.	)	
	)	
DARRELL R. LANTZY a/k/a Bud Lantzy; ELIZABETH M. LANTZY,	)	
	)	
Appellants,	)	
	)	
v.	)	**M E M O R A N D U M**[1]
	)	
ELIZABETH ROJAS, Chapter 13 Trustee,	)	
	)	
Appellee.	)	

Argued and Submitted on November 17, 2010
at Pasadena, California

Filed - December 7, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Kathleen H. Thompson, Bankruptcy Judge, Presiding

Appearances: Louis J. Esbin argued for Appellants Darrel and Elizabeth Lantzy
David Brian Lally argued for Appellee Elizabeth Rojas

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Before: KIRSCHER, LYNCH,[2] and PAPPAS, Bankruptcy Judges.

Chapter 13 debtors-appellants, Darrell R. "Bud" Lantzy and Elizabeth M. Lantzy ("Lantzys"), appeal an order from the bankruptcy court dismissing their case for exceeding the unsecured debt limit for chapter 13 eligibility under 11 U.S.C. 109(e).[3] For the following reasons, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts are undisputed. In May 2002, the Lantzys purchased a home in Castaic, California for $400,000. The home is the Lantzys' principal residence. Washington Mutual Bank, predecessor of JP Morgan Chase, NA ("JP Morgan"), financed the purchase price with a $394,500 loan to the Lantzys, secured by a first priority deed of trust on the Lantzy residence ("First Lien"). In January 2005, Washington Mutual Bank/JP Morgan, loaned the Lantzys an additional $250,000 secured by a second priority deed of trust on the Lantzy residence ("Second Lien").

The Lantzys filed their chapter 13 petition on December 27, 2008. In their Schedule A, the Lantzys asserted that the current value of their home was $270,000, subject to secured claims totaling $534,902.41. The Lantzys' valuation was based on an appraisal dated August 11, 2008. In their Schedule D, the Lantzys asserted that the First Lien was secured for the amount

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[2] The Hon. Brian D. Lynch, Bankruptcy Judge for the Western District of Washington, sitting by designation.

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. code.

of $282,426.41, with an unsecured amount of $12,426.41, and asserted that the Second Lien was secured for the amount of $252,476, with an unsecured amount of $252,476. The Lantzys did not list the Second Lien in their Schedule F and asserted that their unsecured nonpriority claims, which consisted primarily of credit card debt, totaled $129,870.47.

JP Morgan filed a secured proof of claim in connection with the First Lien on January 8, 2009, in the amount of $283,784.38; it filed a secured proof of claim for the Second Lien on January 15, 2009, in the amount of $251,569.32.

Because the value of their home as of the petition date ($270,000) was less than the amount owed on the First Lien ($283,784.38), the Lantzys, on April 6, 2009, sought a determination under sections 506(a) and 1325(a)(5)(B) that they could: (1) be relieved from making postpetition payments on the Second Lien, and (2) treat the claim as "wholly unsecured for purposes of plan confirmation." JP Morgan did not oppose the Lantzys' request. In their chapter 13 plan filed on January 9, 2009, which was prior to JP Morgan filing its secured proof of claim for the Second Lien, the Lantzys proposed to treat JP Morgan as an unsecured creditor with respect to the Second Lien.

The bankruptcy court entered an order on June 16, 2009, voiding JP Morgan's consensual Second Lien and authorizing that JP Morgan's claim for $251,569.32 "be treated as a general unsecured claims and paid pro rata, with other allowed unsecured claims." The order also excused the Lantzys from making any monthly "post petition maintenance payments due, demanded, or to be paid by the [Lantzys on the Second Lien]."

Shortly thereafter, appellee, chapter 13 trustee Elizabeth Rojas ("Trustee"), objected to confirmation of the Lantzys' plan and moved to dismiss their bankruptcy case asserting, inter alia, that the Lantzys were not eligible for chapter 13 relief because their unsecured debt exceeded the statutory limit of $336,900.[4] Trustee argued that the unsecured Second Lien should be added to the unsecured debt of $129,870.47 the Lantzys included in their Schedule F, thus bringing their total unsecured debt to $382,346.[5] The Lantzys countered that their motion to value pursuant to section 506(a) did not avoid JP Morgan's security interest, notwithstanding the treatment of JP Morgan's Second Lien under their plan, because the Second Lien would not actually be void until Lantzys received their chapter 13 discharge. Further, the Lantzys asserted that JP Morgan's Second Lien was "secured" but was merely 100% "undersecured," as opposed to wholly "unsecured," and therefore the Second Lien should not be considered unsecured debt for eligibility purposes under section 109(e).

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[4] Section 109(e) provides: Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $336,900 and noncontingent, liquidated, secured debts of less than $1,010,650, or an individual with regular income and such individual's spouse . . . that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $336,900 and noncontingent, liquidated, secured debts of less than $1,010,650 may be a debtor under chapter 13 of this title.

[5] Trustee asserted that the Lantzys' unsecured debt totaled $382,346. The bankruptcy court calculated the amount to be $381,439.79. To explain the discrepancy, when you add the unsecured debt from Schedule F of $129,870.47 to the debt for the Second Lien of $252,476 stated in Schedule D, you get Trustee's figure of $382,346.47. However, JP Morgan's proof of claim filed for the Second Lien is $251,569.32, which gives rise to the bankruptcy court's figure of $381,439.79.

On December 29, 2009, the bankruptcy court issued an order and memorandum decision ("Eligibility Memorandum") sustaining Trustee's objection to confirmation. The bankruptcy court entered an order confirming the Lantzys' chapter 13 plan on January 26, 2010. On February 2, 2010, it entered an order dismissing the Lantzys' bankruptcy case for the reasons stated in its December 29, 2009 Eligibility Memorandum - the Lantzys were not eligible for chapter 13 due to their unsecured debt exceeding the statutory limit under section 109(e). The Lantzys filed their notice of appeal on February 11, 2010. Upon the Lantzys' motion for stay pending appeal, the bankruptcy court agreed to stay the effectiveness of the dismissal order until resolution of this appeal.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (O). The bankruptcy court's order sustaining Trustee's objections to the Lantzys' chapter 13 plan effectively denied confirmation of their chapter 13 plan. Such orders are interlocutory. Giesbrecht v. Fitzgerald (In re Giesbrecht), 429 B.R. 682, 687 (9th Cir. BAP 2010). However, an order dismissing a debtor's bankruptcy case is a final, appealable order. Id. at 688. Accordingly, the interlocutory confirmation order and Eligibility Memorandum sustaining Trustee's objection to plan confirmation entered on December 29, 2009, which set forth the bankruptcy court's findings and conclusions for its dismissal order entered on February 2, 2010, merged into the bankruptcy court's February 2, 2010 order dismissing the Lantzys' chapter 13 case for ineligibility. Id.

Therefore, we have jurisdiction over both orders under 28 U.S.C. § 158.

III. ISSUE

Did the bankruptcy court err when it included the consensual Second Lien, for which a proof of claim had been filed, in its chapter 13 eligibility determination under section 109(e)?

IV. STANDARD OF REVIEW

Eligibility determinations under section 109 involve issues of statutory construction and conclusions of law, including interpretation of Bankruptcy Code provisions, which we review de novo. Smith v. Rojas (In re Smith), 435 B.R. 637, 642 (9th Cir. BAP 2010)("Smith II").

V. DISCUSSION

A. Applicable Provisions of the Bankruptcy Code.

This appeal involves the interaction of two provisions of the Bankruptcy Code: section 506(a) and section 1322(b)(2). Section 1322(b)(2) permits a chapter 13 debtor's plan to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . ." While this provision prohibits the "strip down" of a partially secured claim on a debtor's principal residence, it does not prohibit the "strip off" of a wholly unsecured lien. Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220, 1223 (9th Cir. 2002). With the recent downturn in the real estate market, it has become commonplace for a home's value to depreciate to the point where the second lienholder is fully unsecured. Section 1322(b)(2) allows a chapter 13 debtor to "strip off" these wholly unsecured

liens. Such "lien strips" are important to chapter 13 debtors who wish to keep their residences because if the court determines that the creditor does not hold an "allowed secured claim," the debtor is relieved from having to make a "stream of payments" to that creditor under the chapter 13 plan. Trejos v. VW Credit, Inc. (In re Trejos), 374 B.R. 210, 214 (9th Cir. BAP 2007); Section 1325(a)(5)(B).

Section 506 effectuates a "lien strip" of these wholly unsecured liens by dividing the secured and unsecured components of a creditor's "allowed claim" according to the value of the underlying collateral. Section 506(a) provides, in relevant part:

> 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.

Thus, section 506(a) makes clear that the status of a claim depends on the valuation of the property. A claim is not a "secured claim" to the extent that it exceeds the value of the property that secures it. Zimmer, 313 F.3d at 1223. A determination under section 506(a) that a creditor is wholly unsecured effectively excuses debtors from treating the creditor's claim as secured under the chapter 13 plan. Smith II, 435 B.R. at 644.

While debtors can certainly benefit from invoking section 506(a) to effectuate a "lien strip," the flip side of this strategy is that it changes a creditor's claim status from secured to unsecured, which can adversely affect a chapter 13

debtor's eligibility under section 109(e). Section 109(e) limits chapter 13 eligibility to individuals that owe noncontingent, liquidated, unsecured debts which total less than $336,900 on the date of the filing of the petition.[6] Eligibility is normally determined based on the figures included in the debtor's original schedules, checking only to see that the schedules were prepared in good faith. Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 982 (9th Cir. 2001). In light of a good faith objection, the court may look beyond the schedules to other evidence. Id.

The unsecured portion of undersecured debt is counted as "unsecured" for section 109(e) eligibility purposes. Scovis, 249 F.3d at 983; Smith II, 435 B.R. at 649.

B. The Bankruptcy Court Did Not Err When It Included The Wholly Unsecured Second Lien In Its Chapter 13 Eligibility Determination Under Section 109(e).[7]

The bankruptcy court determined that in light of a good faith eligibility objection it was compelled to "look beyond the schedules and consider whether the schedules were designed to achieve eligibility at the expense of reality." While the Lantzys appeared to be eligible for chapter 13 on the face of their schedules because JP Morgan's Second Lien was listed as a "secured" claim, when the Lantzys filed bankruptcy in December

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[6] This amount reflects the limit in effect on December 27, 2008, the date the Lantzys filed their bankruptcy petition. This amount is subject to periodic adjustment as provided in section 104.

[7] Like the appellants in Smith II, the Lantzys prefer to characterize the second lienholders' claims as "undersecured." They attempt to create a distinction where no real difference exists. Under their plan, just like the debtors in Smith II, the Lantzys treat JP Morgan's Second Lien as a wholly unsecured claim.

2008, they were in possession of an August 11, 2008 appraisal that indicted the value of their home was insufficient to provide any security for the Second Lien. Thus, the bankruptcy court concluded the Lantzys knew on the petition date that JP Morgan's Second Lien was unsecured despite their attempt to list it in their Schedule D, and they relied on this fact to prove that very point in their section 506(a) valuation motion, which relegated JP Morgan's claim to an unsecured status and rendered its Second Lien void under section 506(d). While recognizing that JP Morgan's interest is contingent until the Lantzys complete their chapter 13 plan and receive a discharge, the bankruptcy court reasoned that the Lantzys were receiving the benefit of treating JP Morgan's claim as unsecured during the pendency of their case; they could not treat it as unsecured for plan purposes and secured for determining eligibility. Therefore, in accordance with Scovis, the controlling precedent in this circuit, and In re Smith, 419 B.R. 826, 831 (Bankr. C.D. Cal. 2009), the bankruptcy court held that JP Morgan's completely undersecured debt must be counted as "unsecured" for purposes of eligibility.

The Lantzys raise several arguments on appeal, some of which go more toward their disagreement with Scovis as opposed to any error committed by the bankruptcy court. First, they contend that Scovis applies only to judicial liens, not consensual liens arising from a deed of trust, and thus the bankruptcy court erred by not distinguishing that fact. Trustee argues that this is a distinction without a difference. She asserts that the issue is the value of the property compared to the total liens on the

property, and the amount due and owing on the senior lien; whether the junior lien is consensual or involuntary does not alter the eligibility analysis. We agree with Trustee. Further, the Lantzys' argument was rejected by the bankruptcy court in In re Smith. 419 B.R. at 831, and by the Panel in Smith II, 435 B.R. at 647. In Smith, the bankruptcy court reasoned that even though a chapter 13 debtor cannot avoid a consensual lien until a court issues discharge, unlike a judgment lien that can be stripped under section 522(f)(1)(A), debtors' comparison to the two situations did not explain why the court should treat consensual liens differently for eligibility purposes under section 109(e):

> If a court dismisses a case in which a debtor used § 522(f) to strip a judgment lien, § 349(b)(1)(b) restores the lien. Thus a lien strip under § 522(f), which is very similar to the valuation and stripping of a consensual lien, is not final until discharge. Further, the Ninth Circuit, in Scovis, cited to In re Miller, 907 F.2d 80 (8th Cir. 1990). The Miller court explicitly found that an undersecured portion of a consensual lien counted towards the debtor's unsecured debt limit. The similarities in the finality in the stripping of a judgment lien and a consensual lien and Scovis's citation to a case determining the undersecured portion of a consensual lien to be unsecured debt for debt limit purposes suggest that Scovis's analysis does extend to consensual liens.

419 B.R. at 831. See also In re Groh, 405 B.R. 674, 676 (Bankr. S.D. Cal. 2009)(rejecting same argument and stating that nothing in Scovis suggests that it would not apply equally to an undersecured consensual lien and seeing no rationale for treating the two types of liens differently for the purposes of section 109(e)).

Second, the Lantzys contend that, under California law, JP Morgan retained all rights and remedies pursuant to its Second

Lien, as well as its security interest, and therefore JP Morgan remains secured for eligibility purposes under section 109(e). Cal. Civ. Code § 2909. Lantzys assert that because JP Morgan's Second Lien is not avoided until the chapter 13 discharge is entered, and because its lien rights are not eliminated under California law until foreclosure, the Second Lien remains secured, and the court cannot consider it unsecured debt in its eligibility analysis.

The bankruptcy court in Smith rejected the Lantzys' argument because it misstates how lien avoidance operates in a chapter 13:

> Section 506(a) allows the court to value the property. Once the court values the property, § 506(d) voids any lien or portions of a lien securing a debt that exceeds the value of the property. This lien is then void for purposes of the bankruptcy. Once the court issues a Chapter 13 discharge . . ., the lien avoidance is complete (citations omitted). California Civil Code § 2909 does not play a role in this process, and decisions subsequent to Dewsnup [v. Timm, 502 U.S. 410 (1992)] limit its applicability to the Chapter 7 context in which the issue arose [citing Lam v. Investors Thrift (In re Lam), 211 B.R. 36 (9th Cir. BAP 1997), and Zimmer, supra].

419 B.R. at 831. The Panel also addressed and rejected the Lantzys' argument thirteen years ago in Lam. There, the Panel considered the lienholder's "rights" under California law and reasoned that if a lien has no "security" interest in the property of the debtor, its status as a lien is questionable. 211 B.R. at 40. "An analysis of the state law 'rights' afforded a holder of an unsecured 'lien,' if such a situation exists, indicates these rights are empty rights from a practical, if not a legal, standpoint." Id. (emphasis added). In other words, no "rights" really exist in a lien that is wholly undersecured or unsecured. For example, a foreclosure would not result in any

financial return to the lienholder, even if a forced sale could be accomplished where the lien attaches to nothing. Id. Further, nothing secures the "right" of the lienholder to receive monthly installment payments, to retain the lien until the debt is paid off, or the right to accelerate the loan upon default, if no security exists for the lienholder to foreclose on should the debtor fail to fulfill the contract payment obligations. Id. Finally, even though the determination of property rights ordinarily is controlled by state law, the Panel reasoned in Smith II that merely holding a security interest on the petition date does not mean that the creditor is a secured creditor for purposes of the Bankruptcy Code generally, or section 109(e) specifically:

> Under section 506(a), a creditor's rights in property are dependent on the bankruptcy estate's interest in property; the determination of the estate's interest is separate from and must precede the determination of the creditor's interest. If the estate has no interest in the property at issue, . . . it is not possible for the claim of [the] creditor . . . to be secured by that property under section 506(a).

435 B.R. at 648 (citing U.S. v. Snyder, 343 F.3d 1171, 1176 (9th Cir. 2003)(although Snyder addressed what happens to a creditor's lien if the property to which it attaches never became property of the estate under section 541(c)(2), the Panel found it to be instructive in the chapter 13 eligibility analysis). The Panel concluded that "where a creditor cannot enforce its security interest in property of the estate, the creditor is precluded from 'attaining secured status in the bankruptcy proceeding.' " Id. (quoting Snyder, 343 F.3d at 1179).

Third, the Lantzys contend that their motion to value merely

sought to determine the value of their home for purposes of determining adequate protection payments and plan treatment; they did not challenge the extent, validity, or priority of JP Morgan's Second Lien, for which Rule 7001(2) requires that an adversary proceeding be filed as opposed to a motion, and the bankruptcy court's valuation order did not avoid it. They cite In re Mansaray-Ruffin, 530 F.3d 230, 236-37 (3d. Cir. 2008), which they contend lays to rest the issue of distinguishing between a motion to value real property and a challenge to the validity of a deed of trust. We fail to see the point of the Lantzys' argument here. We agree that they did not challenge the extent, validity, or priority of JP Morgan's Second Lien, which requires an adversary proceeding. They, unlike the debtor in Mansaray-Ruffin, sought to strip JP Morgan's Second Lien based on the value of the collateral, which can be accomplished by motion. Mansaray-Ruffin merely notes the differences in the procedural requirements to challenge the validity of a lien as opposed to a lien valuation determination ("lien strip"), which it recognized can be achieved by motion. 530 F.3d at 241-42. In any event, Mansaray-Ruffin is not on point and distinguishable in many respects. There, the debtor attempted to invalidate a first lien on her home by treating it as an unsecured claim in her chapter 13 plan; Mansaray-Ruffin did not involve a section 109(e) eligibility determination. Second, the lien at issue was a first lien on the debtor's residence, not a wholly undersecured or unsecured second lien. Third, the debtor disputed the validity of the creditor's lien based on TILA violations; the debtor was not seeking a valuation determination under section 506(a).

Moreover, the debtors in Smith II made the same argument the Lantzys assert here, and the Panel concluded that it did not need to reach the issue because it was only deciding whether the application of section 506(a) can operate to change the status of a claim from secured to unsecured in a bankruptcy case and whether such change impacts a section 109(e) eligibility determination, which the Panel decided in the affirmative. 435 B.R. at 647 n.7. That is all we are deciding here as well, and we see no reason, and the Lantzys have not provided one, to revisit this issue. We are bound by our precedent. Palm v. Klapperman (In re Cady), 266 B.R. 172, 181 n.8 (9th Cir. BAP 2001), aff'd, 315 F.3d 1121 (9th Cir. 2003). Further, we note that JP Morgan has not raised any due process concerns; it has remained silent throughout the case and this appeal.

Finally, the Lantzys contend that their case is distinguishable from Smith II because JP Morgan filed a secured proof of claim for its Second Lien, to which the Lantzys did not object, thus under section 502(a) the claim is deemed valid and allowed and JP Morgan should be treated as secured. In fact, the Lantzys admitted at oral argument that had JP Morgan not filed a proof of claim, they would not be here. Trustee counters that if the Lantzys were correct, then they would have to make payments to JP Morgan on the Second Lien under section 1322(b)(5). Determining whether a debtor is eligible for chapter 13 based on whether the creditor filed a secured proof of claim would be a dangerous practice and improperly puts eligibility in control of the creditor. See Kanke v. Adams (In re Adams), 373 B.R. 116, 121 (10th Cir. BAP 2007); Barcal v. Laughlin (In re Barcal),

213 B.R. 1008, 1015 (8th Cir. BAP 1997). Moreover, had Congress intended that proofs of claim be the determinative factor in whether an individual could proceed under chapter 13, it would have so specified. In re Edwards, 51 B.R. 790, 791 (Bankr. D. N.M. 1985).

Regardless of how the Lantzys classify it, they modified JP Morgan's rights in its Second Lien by way of section 506(a) rendering it void as to any unsecured portion of JP Morgan's claim under section 506(d). As a result, JP Morgan no longer holds a secured claim for the Second Lien in the Lantzys' bankruptcy case.

VI. CONCLUSION

The bankruptcy court properly reviewed the Lantzys' schedules and other evidence to determine that under section 506(a) JP Morgan's Second Lien was wholly unsecured at the time they filed their bankruptcy petition, regardless of whether the Lantzys scheduled it as a secured or unsecured debt. The schedules and other evidence provided the bankruptcy court with a sufficient "degree of certainty" to regard the Second Lien as unsecured as of the petition date for eligibility purposes. Scovis, 249 F.3d at 984. The bankruptcy court correctly applied Scovis and counted the wholly unsecured debt as "unsecured" for purposes of eligibility determination under section 109(e). Therefore, we AFFIRM.