

FEB 09 2016

ORDERED PUBLISHED

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-15-1142-JuKuW
)		
LUCIO CHAGOLLA; MARIA D.)	Bk. No.	08-57523
HERNANDEZ MURUETA,)		
)		
Debtors.)		
_____)		
)		
LUCIO CHAGOLLA; MARIA)		
D. HERNANDEZ MURUETA,)		
)		
Appellants,)		
v.)		
)		
JP MORGAN CHASE BANK, N.A., ¹)		
)		
Appellee.)		
_____)		

O P I N I O N

Argued and Submitted on January 21, 2016
at San Francisco, California

Filed - February 9, 2016

Appeal from the United States Bankruptcy Court
Northern District of California, San Jose Division

Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

Appearances: David Boone for appellants Lucio Chagolla and
Maria D. Hernandez Murueta.

Before: JURY, KURTZ, and WANSLEE, Bankruptcy Judges.

¹ JP Morgan Chase Bank did not participate in this appeal.

1 JURY, Bankruptcy Judge:
2

3 Appellants Lucio Chagolla and Maria D. Hernandez Murueta
4 ("Debtors") appeal the bankruptcy court's order denying their
5 unopposed valuation motion under 11 U.S.C. § 506(a) and (d) and
6 Federal Rule of Bankruptcy Procedure ("FRBP") 3012, seeking to
7 value real property upon which the junior lienholder, JP Morgan
8 Chase Bank, N.A. ("JP Morgan"), is secured.² Although the
9 valuation motion was brought after Debtors completed their plan
10 and received a discharge, Debtors assert that the bankruptcy
11 court erred in denying the motion as untimely. We agree with
12 Debtors. In the absence of prejudicial delay, we find that a
13 motion to value and avoid the lien of a junior lienholder may be
14 brought after discharge if the confirmed plan called for its
15 avoidance and treated it as unsecured and if no prejudice to the
16 junior lienholder will occur. Accordingly, for the reasons
17 stated below, we REVERSE the bankruptcy court's order and REMAND
18 the matter to the bankruptcy court for further proceedings
19 consistent with this opinion.

20 **I. FACTS**

21 The facts are not in dispute. Debtors owe more money on
22 their home than it is worth. The fair market value of their
23 home on the confirmation date was much less than the amount due
24 on the first mortgage, let alone what is owed on the second.
25 The second mortgage held by JP Morgan is the subject of the

26 _____
27 ² Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
"Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 instant appeal.

2 Debtors filed a petition and Chapter 13 plan on December
3 23, 2008. Pursuant to the plan, Debtors would pay zero percent
4 to unsecured creditors and would file an adversary proceeding to
5 avoid the junior lien of JP Morgan within ninety days of the
6 commencement of the case. The plan was confirmed at a hearing
7 on February 19, 2009, with the order entered on March 2, 2009.
8 JP Morgan did not object to its treatment at confirmation. The
9 confirmation hearing was held prior to the end of the ninety-day
10 period provided in the plan to file the adversary to avoid JP
11 Morgan's lien. However, no adversary proceeding was ever
12 commenced by Debtors. On March 12, 2014, after completing all
13 payments required by the plan, Debtors obtained a discharge.
14 The case was closed on April 11, 2014.

15 Nearly a year after the case was closed and six years after
16 the plan was confirmed, Debtors filed a motion to reopen the
17 case for the sole purpose of filing a lien avoidance motion.
18 After the court reopened the case, on February 23, 2015, Debtors
19 filed their lien avoidance motion, which provided: (1) the fair
20 market value of their home at confirmation was \$550,000.00;
21 (2) Countrywide Home Loans Servicing, L.P. holds a senior deed
22 of trust with a principal balance of \$628,804.83; and (3) JP
23 Morgan holds a junior lien with a principal balance of
24 \$130,686.22. Relying on the holding of Zimmer v. PSB Lending
25 Corporation(In re Zimmer), 313 F.3d 1220 (9th Cir. 2002),
26 Debtors argued that based on the property valuation, the wholly
27 unsecured second lien of JP Morgan should be avoided. Although
28 the motion was properly served, JP Morgan did not file an

1 opposition or participate in the proceeding.

2 On April 21, 2015, the bankruptcy court entered an order
3 denying the motion. Although recognizing that there is not a
4 time limitation in the Bankruptcy Code or Rules which would
5 prevent Debtors from bringing their valuation motion after the
6 case was closed, the court held that (1) it lacked jurisdiction
7 to grant the motion, (2) the motion was untimely based on case
8 law the court reviewed, and (3) the motion was not heard in
9 conjunction with the hearing on the plan as required by
10 § 506(a). This timely appeal followed.

11 II. JURISDICTION

12 The bankruptcy court had jurisdiction over this proceeding
13 under 28 U.S.C. §§ 1334 and 157(b). We have jurisdiction under
14 28 U.S.C. § 158.

15 III. ISSUE

16 Whether the bankruptcy court erred in denying, as being
17 untimely, Debtors' motion to value and avoid a junior lien that
18 was brought after Debtors were discharged and the case was
19 closed.

20 IV. STANDARD OF REVIEW

21 Questions of law are subject to de novo review. United
22 States v. Lang, 149 F.3d 1044, 1046 (9th Cir. 1998). Questions
23 of fact are reviewed under the clearly erroneous standard.
24 Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

25 Based on the undisputed facts, we review the bankruptcy
26 court's conclusions of law de novo. Havelock v. Taxel (In re
27 Pace), 67 F.3d 187, 191 (9th Cir. 1995); United States v. Lang,
28 149 F.3d at 1046.

1 "closely related," including all "matters 'affecting the
2 interpretation, implementation, consummation, execution, or
3 administration of the confirmed plan.'" In re Wilshire
4 Courtyard, 729 F.3d at 1287 (quoting Binder v. Price Waterhouse &
5 Co. (In re Resorts Int'l, Inc.), 372 F.3d 154, 166-67 (3rd Cir.
6 2004).

7 Based on Debtors' confirmed plan, which stated the junior
8 lien of JP Morgan would be avoided and treated as unsecured, the
9 bankruptcy court retained jurisdiction over the matter to
10 "implement" or "enforce" the plan confirmation order. See
11 Travelers Indemnity Company, 557 U.S. at 151 ("[i]t is
12 undisputed that [a] bankruptcy court [has] continuing
13 jurisdiction to interpret and enforce its own ...orders"); see
14 also In re Wilshire Courtyard, 729 F.3d at 1287. Furthermore,
15 § 105(a) provides additional authority for the bankruptcy court
16 to implement the plan order. Section 105(a) allows a court to
17 issue any order, process, or judgment that is necessary or
18 appropriate to carry out the provisions of the Bankruptcy Code.

19 Therefore, the bankruptcy court had jurisdiction to
20 implement and enforce Debtors' confirmed chapter 13 plan order
21 with respect to treatment of the second lien of JP Morgan.

22 **B. Debtors' motion was not untimely under § 506(a) or Rule 3012**

23 Section 506(a) provides for judicial valuation of
24 collateral in order to determine the status of a creditors'
25 claim. See Nobelman v. American Savings Bank, 508 U.S. 324, 328
26 (1993). The statute "divides claims into 'secured claims' and
27 'unsecured claims.'" In re Zimmer, 313 F.3d at 1222-23 (quoting
28 11 U.S.C. § 506(a)). Specifically, § 506(a) provides:

1 An allowed claim of a creditor secured by a lien on
2 property in which the estate has an interest . . . is a
3 secured claim to the extent of the value of such creditor's
4 interest in the estate's interest in such property . . .
5 and is an unsecured claim to the extent of the value of
6 such creditor's interest...is less than the amount of such
7 allowed claim. Such value shall be determined in light of
8 the purpose of the valuation and of the proposed
9 disposition or use of such property, and in conjunction
10 with any hearing on such disposition or use or on a plan
11 affecting such creditor's interest.

12 As such, the "thrust of § 506(a) is to classify allowed claims
13 as either secured or unsecured, which in turn affects how the
14 bankruptcy code treats them." Woolsey v. Citibank N.A. (In re
15 Woolsey), 696 F.3d 1266, 1272 (10th Cir. 2013).

16 Rule 3012 provides the procedure for valuing collateral and
17 is to be read together with § 506(a). It provides:

18 The court may determine the value of a claim secured by a
19 lien on property in which the estate has an interest on
20 motion of any party in interest and after a hearing on
21 notice to the holder of secured claim and any other entity
22 as the court may direct.

23 The bankruptcy court correctly conceded that neither
24 § 506(a) nor Rule 3012 has a time limit for filing a valuation
25 motion. See Collier on Bankruptcy, ¶ 3012.01 (16th ed. 2012)
26 ("The timing of the determination of a particular valuation will
27 vary depending on the purpose for which it is sought.").
28 Furthermore, we are not aware of any reported Ninth Circuit
cases which place a time bar on bringing a valuation motion
after discharge or after the case is closed. Therefore, the
motion was not per se untimely.

In a practical sense, we see little difference between an
avoidance motion filed under § 506(a) and one filed under
§ 522(f) such that only the passage of time, without prejudice to
a creditor, bars recovery. Although a lien avoidance under

1 § 522(f)³ is substantively different, an analogy to the timing of
2 such motion is appropriate. It has been consistently held that
3 there exists no time limit to bring a motion to avoid a lien
4 under § 522(f). Yazzie v. Postal Fin. Co. (In re Yazzie), 24
5 B.R. 576, 577 (9th Cir. BAP 1982) ("No provisions of the Code or
6 Rules (present or proposed) have established a time limit for
7 bringing an action to avoid a lien under [] § 522(f)."); see also
8 Goswami v. MTC Distributing (In re Goswami), 304 B.R. 386, 392
9 (9th Cir. BAP 2003); Luna v. California National Bank (In re
10 Luna), 2007 WL 7541003, at *3 (9th Cir. BAP 2007). Rather, the
11 key to whether the bankruptcy court will allow a § 522(f) lien
12 avoidance to be filed after a case is closed is "whether the
13 creditor is sufficiently prejudiced so that i[t] would be
14 inequitable to allow avoidance of the lien." ITT Financial Serv.
15 v. Ricks (In re Ricks), 89 B.R. 73, 75-6 (9th Cir. BAP 1988); see
16 also In re Goswami, 304 B.R. at 392. This argument can be
17 applied equally in a § 506(a) lien avoidance.

18 Under both statutes, neither the Code nor the Rules
19 establish a time limitation for filing the avoidance motion.
20 Because Congress has not placed any statutory limitations, nor
21 are there any common law doctrines which draw a time bar, we are
22 persuaded that no arbitrary time limitation exists. However,
23 this finding is not without limitation. In order to bring a
24 motion to avoid lien under § 506(a) after a debtor has received a

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26 ³ Section 522(f) provides: the debtor may avoid the fixing
27 of a lien on an interest of the debtor in property to the extent
28 that such lien impairs an exemption to which the debtor would
have been entitled . . . if such lien is - (A) a judicial
lien

1 discharge or the case is closed, at a minimum, the following must
2 be satisfied: first, the confirmed plan must call for avoiding
3 the wholly unsecured junior lien and treat any claim as
4 unsecured; second, the chapter 13 trustee must treat the claim as
5 unsecured pursuant to the plan; and third, the creditor must not
6 be sufficiently prejudiced so that it would be inequitable to
7 allow avoidance after entry of discharge or the closing of the
8 case.

9 In this case, the confirmed plan provided that the wholly
10 unsecured junior lien of JP Morgan would be avoided and treated
11 as unsecured. JP Morgan did not object to either its treatment
12 under the plan or to Debtors' valuation motion. The docket
13 reflects that prior to confirmation JP Morgan filed a secured
14 claim based on the second lien. The Trustee's Final Report
15 acknowledges the claim was scheduled as secured but asserted as
16 unsecured and shows that it, like all the other unsecured claims,
17 received nothing.⁴ Therefore, there is nothing in the record to
18 indicate that JP Morgan has been prejudiced in any way by
19 Debtors' delay in avoiding their lien.⁵

20 The record indicates Debtors gave JP Morgan adequate notice
21 of both the plan and the subsequent motion. Consistent with the
22

23
24 ⁴ Although neither JP Morgan's proof of claim nor the
25 Trustee's Final Report were included in the record, we may take
26 judicial notice of the underlying bankruptcy court records
relating to an appeal. See O'Rourke v. Seaboard Sur. Co. (In re
E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

27 ⁵ The confirmed plan paid 0% to unsecured creditors, so
28 whether JP Morgan did or did not file a claim, its mandatory
treatment would have been the same.

1 plan, the motion set forth the proposed treatment of JP Morgan's
2 lien, the address of the property, the property value, and that
3 this value was less than the amount owed on the first mortgage.
4 As such, JP Morgan had "adequate notice" of the proceeding, yet
5 chose not to participate. See Mullane v. Cent. Hanover Bank &
6 Trust Co., 339 U.S. 306, 314 (1950) ("[adequate notice is notice
7 that is] reasonably calculated, under all circumstances, to
8 apprise interested parties of the pendency of the action and
9 afford them an opportunity to present their objections").
10 Furthermore, as noted, the chapter 13 trustee made payments over
11 the life of the plan on the basis that JP Morgan's claim was
12 unsecured. As such, the chapter 13 plan is preclusive as to the
13 treatment of JP Morgan's claim. See Lomas Mortgage USA v. Wiese,
14 980 F.2d 1279, 1284 (9th Cir. 1993) ("An order confirming a
15 Chapter 13 plan is res judicata as to all justiciable issues
16 which were or could have been decided at the confirmation
17 hearing.").

18 Based on the foregoing, we see no prejudice and therefore no
19 reason why JP Morgan's lien could not be avoided.

20 **C. Reading of § 506(a)**

21 The bankruptcy court concluded that § 506(a) requires the
22 valuation determination be made in conjunction with a hearing on
23 the plan. It reasoned that because Debtors' motion was not heard
24 at the same time as the confirmation hearing, it was untimely.

25 We disagree with the court's analysis. Section 506(a)
26 requires that the ". . . value shall be determined . . . in
27 conjunction with any hearing on such disposition or use or on a
28 plan affecting such creditor's interest." The language of

1 § 506(a) is disjunctive. The hearing could in fact be in
2 conjunction with the disposition **or** use. It is not limited only
3 to the confirmation of the plan. Moreover, in "conjunction" does
4 not necessarily mean "a simultaneous occurrence," but rather
5 could mean "a combination of circumstances." Merriam Webster at
6 244 (10th Ed.). Under this reading, the statute could allow a
7 hearing on the value in "conjunction" with the continued use or
8 disposition of Debtors' property, as was the case here. Since
9 the confirmed plan called for avoiding the junior lien and
10 treating it as unsecured, a valuation hearing at any time could
11 be deemed "in conjunction with" the plan.

12 **D. Bankruptcy court's authority is not persuasive**

13 The bankruptcy court reached its conclusion by relying on
14 three cases, which we do not find controlling or persuasive.

15 The bankruptcy court first relied on In re Wilkins, 71 B.R.
16 665 (Bankr. N.D. Ohio 1987), asserting that the Wilkins court
17 denied a valuation motion as untimely when it was filed a mere
18 month after the confirmation of the chapter 13 plan. However, in
19 Wilkins, the confirmed plan provided for 100% payment of the
20 secured claim on a car. Only when the debtors realized that plan
21 would not be feasible did they file their valuation motion, to
22 which the creditor objected. Our case is different simply
23 because the plan called for JP Morgan's treatment as unsecured
24 and it was paid as such. Debtors here did not materially change
25 the creditor's expected treatment under the plan, making Wilkins
26 distinguishable.

27 Secondly, it relied on McPherson v. Green Tree Servicing,
28 LLC (In re McPherson), 2013 WL 6657599 (D. Colo. December 17,

1 2013), an unpublished case out of Colorado. The McPherson
2 district court affirmed the bankruptcy court finding that a
3 reasonable interpretation of § 506(a) is that it requires the
4 valuation be made either separate from or during the confirmation
5 hearing and in conjunction with the confirmation of the plan.
6 However, in McPherson, the plan provided that the unsecured
7 status of the creditor would be determined subject to the court's
8 order granting the valuation motion. No hearing was held and no
9 valuation made prior to confirmation, leaving the plan terms
10 uncertain. Here, the plan terms were certain and the later-filed
11 valuation motion was consistent with the terms.

12 Finally, the court relied on Cal. Dif. Inc., v. Eaton (In re
13 Eaton), 2006 WL 6810924 (9th Cir. BAP February 28, 2006). The
14 bankruptcy court relied on a footnote in Eaton, which expressed
15 "doubt" that a bankruptcy court can value a secured claim under
16 § 506(a) "in conjunction with any hearing on a plan" when the
17 valuation hearing was years after confirmation.⁶ Being
18 unpublished, Eaton is of no precedential value to this Panel and
19 the footnote provided no analysis. Moreover, the plan in Eaton
20 was silent on the treatment of the secured claims, which caused
21 due process concerns not present in the instant case.

23
24 ⁶ Footnote 14 provided: "We doubt, but need not decide
25 under these facts, whether the bankruptcy court can, consistent
26 with [506(a),] value a secured claim in conjunction with any
27 hearing on ... a plan affecting such [secured] creditor's
28 interest when that plan was confirmed years before, and the
debtors have completed their performance of that plan and
received a discharge." In re Eaton, 2006 WL 6810924, at *8 n.
14.

1 **E. Despite § 1322(b)(2), the bankruptcy court may remove the**
2 **wholly unsecured lien of JP Morgan in this case**

3 In a chapter 13, generally speaking, claims secured by a
4 security interest in a debtor's principal residence may not be
5 modified. See § 1322(b)(2) (providing a plan may "modify the
6 rights of holders of secured claims, other than a claim secured
7 only by a security interest in real property that is the debtor's
8 principal residence"). However, despite § 1322(b)(2),
9 such a lien may be "stripped off" and avoided under § 506(d) if
10 the bankruptcy court determined under § 506(a) that there is no
11 value in the residence to secure the claim and that the
12 creditor's claim is rendered wholly unsecured. In re Zimmer, 313
13 F.3d at 1222-23.

14 As the record indicates, Debtors' valuation motion
15 established that JP Morgan held a wholly unsecured second. Under
16 In re Zimmer, the JP Morgan second may be "stripped off" and
17 avoided under § 506(d). Therefore, we conclude that the trial
18 court erred in denying the lien avoidance sought by Debtors.

19 **VI. CONCLUSION**

20 For the reasons stated above, we REVERSE the decision of the
21 bankruptcy court and REMAND for further proceedings consistent
22 with the opinion.
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