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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

In re KARL NATHAN COSSEY and SHARON K. COSSEY, Debtors.	85C-00232 86PC-0408
COTTONWOOD LEASING, Plaintiff-Appellant, vs. KARL NATHAN COSSEY and SHARON K. COSSEY, Defendants-Appellees.	Case No. 88-NC-033J MEMORANDUM OPINION AND ORDER

On August 5, 1988, the court heard arguments on Cottonwood Leasing's appeal from an order of the bankruptcy court denying its motion for summary judgment and granting the defendants' motion to dismiss. The court reserved ruling on the appeal at that time. Now, after considering the arguments of counsel and the record in this case, the court enters this memorandum opinion and order affirming the bankruptcy court's order.

I.

In 1984 the plaintiff's predecessor (referred to as the plaintiff for convenience) leased four tanning beds to the

defendants, Karl and Sharon Cossey. The lease was secured by the equipment and by a trust deed on the Cosseys' home. On January 25, 1985, the Cosseys filed a voluntary petition for relief under chapter 13 of the bankruptcy code, 11 U.S.C. §§ 1301-30. The plaintiff's security interests were duly noted on the debtors' schedule of creditors and statement of real property. Record on Appeal ("ROA") at 26 & 28.

The debtors' chapter 13 plan provided that the leased equipment would be surrendered to the plaintiff and that any deficiency would become an unsecured claim. The amount of any deficiency was apparently to be determined after testimony to be taken at the confirmation hearing to establish the fair market value of the property.[1] See Chapter 13 Plan, § III ¶ 4; ROA at 37. The plan further stated that "attached hereto and hereby served upon" the plaintiff was a summons and complaint to avoid the plaintiff's security interest. Id. § III ¶ 6; ROA at 38. No complaint was ever filed or served on the plaintiff. The plaintiff never filed any objection to the chapter 13 plan.

After the plan was filed but before it was confirmed, the debtors and the plaintiff entered into a stipulation by which the debtors agreed to return the tanning equipment to the plaintiff and agreed to a modification of the stay to allow the plaintiff

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[1] The transcript of the confirmation hearing is not part of the record on appeal, but apparently no testimony was taken at the hearing to establish the value of the beds. At oral argument on this appeal, the attorney for the debtors represented to the court, however, that he had made a proffer to the bankruptcy court at the confirmation hearing to the effect that the value of the beds was equal to the plaintiff's claim.

to sell the equipment and apply the proceeds to the amounts due under the lease. The stipulation further provided that the plaintiff had not waived any claims or rights under the lease agreement and the trust deed. See ROA at 41-43. In March 1985 the bankruptcy court approved the stipulation and modified the stay. See ROA at 49.

In April 1985 the plaintiff filed a proof of claim describing its claim as an unsecured claim for $34,976.54, apparently the full amount of its claim, without any reduction to reflect the disposition of the tanning equipment. Attached to the proof of claim were copies of the lease and trust deed, indicating that the claim was a secured claim--not an unsecured claim as indicated. The debtors never objected to the proof of claim.

On July 18, 1985, after a confirmation hearing that the plaintiff did not attend, the bankruptcy court entered an order confirming the plan. The order provided that the collateral securing the obligation to the plaintiff was "to be surrendered in full satisfaction of the obligation." Order Confirming Chapter 13 Plan, Bankr. No. 85C-00232, at 2; ROA at 52. The plaintiff apparently did not receive a copy of the order but was aware that the plan had been confirmed and that its claim was being treated as unsecured by at least the time of the second disbursement under the plan, in October 1985. See Trustee's Second Report and Accounting of Disbursement, ex. B at 3; ROA at 62.

In May 1986 the plaintiff filed a complaint to set aside the order of confirmation and to modify the plan to show the plaintiff as a secured creditor. On November 12, 1987, the bankruptcy court heard arguments on the plaintiff's motion for summary judgment and on the debtors' motion to dismiss and granted the debtors' motion to dismiss. The bankruptcy court reasoned that the plaintiff had not met the requirements for modification of a chapter 13 plan under 11 U.S.C. § 1329 or for revocation of the order of confirmation under 11 U.S.C. § 1330, and thus there was no statutory basis for the relief requested. The bankruptcy court further held that, even if the plaintiff could amend its proof of claim to show its claim as secured, the amendment would not have any effect because, under 11 U.S.C. § 1327, the order confirming the plan had vested in the debtors all their property free and clear of any claim or interest of any creditor provided for by the plan, including the plaintiff. Finally, the bankruptcy court found that, even if there were means by which the plaintiff could revise the plan, the doctrine of laches precluded it from doing so since the debtors' other creditors had relied on the confirmed plan.

The plaintiff has appealed the bankruptcy court's decision, arguing that it should be allowed to amend its proof of claim to reflect its secured status and that the debtors' plan should be modified to treat it as a secured creditor. The plaintiff further argues that it still holds a valid lien against the debtors' property that has not been avoided.

II.

Under section 501(a) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330, a creditor may file a proof of claim. No creditor is required to file a proof of claim. Simmons v. Savell (In re Simmons), 765 F.2d 547, 551 (5th Cir. 1985). Indeed, a secured creditor may simply rely on his lien, which generally is unaffected by bankruptcy even if the collateral has passed into the hands of the trustee in bankruptcy. See, e.g., In re Tarnow, 749 F.2d 464, 465 (7th Cir. 1984) (a secured creditor may ignore the bankruptcy proceedings and look to his lien for satisfaction of his debt); American Standard, Inc. v. Nass (In re Jack Kardow Plumbing Co.), 451 F.2d 123, 134 (5th Cir. 1971). If a proof of claim is filed, the claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). If the proof of claim is properly executed and filed, it constitutes prima facie evidence of the validity and amount of the claim. Bankr. R. 3001(f). In this case, the plaintiff chose to file a proof of claim. No one objected to the plaintiff's claim, so that claim is deemed allowed.

Section 506(a) of the Code states:

> 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 . . . 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.

The plaintiff's claim was an allowed claim, under 11 U.S.C. §

502(a), and it was secured by a lien on property in which the estate had an interest--namely, the tanning beds and the debtors' home. Thus, arguably it was a secured claim under 11 U.S.C. § 506(a) to the extent of the value of the plaintiff's interest in the property, despite the plaintiff's designation of the claim on its proof of claim form as "unsecured."

The bankruptcy court apparently acknowledged that the claim was secured. It stated that the proof of claim could be amended to correct the "unsecured" designation but that the amendment would have no effect. This court agrees that amendment of the proof of claim would not avail the plaintiff, but not for the reason the bankruptcy court gave.

The plaintiff sought modification of the plan under sections 1329 and 1330 of title 11. The bankruptcy court correctly concluded that those sections do not justify the relief sought.

Section 1330 allows the court to revoke an order of confirmation if the order was procured by fraud. The plaintiff does not claim that the confirmation order in this case was procured by fraud, so section 1330 is inapplicable.

Section 1329 allows for modification of a plan only "upon request of the debtor, the trustee, or the holder of an allowed unsecured claim."[2] Under the plaintiff's own theory of the case

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[2] Section 1329(a) reads in full:

> At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--

the plaintiff holds an allowed secured claim--not an allowed unsecured claim--so section 1329 does not apply. Moreover, section 1329 does not authorize the modification requested, namely, changing the status of a claim provided for in the plan from unsecured to secured. It only allows modification of a plan to change the amount of payments or the time for payments under the plan. Thus, sections 1329 and 1330 provide no basis for modifying the debtors' plan as requested.

Perhaps more important, the plaintiff's request to modify the plan proceeds from a false premise, namely, that the plan incorrectly treated the plaintiff's claim as unsecured. Rather, the plan recognized that the plaintiff had a lien on the tanning equipment and on the home. Instead of treating the claim as unsecured, the plan purported to provide for the plaintiff's secured claim by rejecting the unexpired lease on the tanning equipment, surrendering the equipment to the plaintiff and bringing an action to avoid the plaintiff's security interests in the equipment and the home. Under 11 U.S.C. § 1322(b)(2) a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that

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> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
> (2) extend or reduce the time for such payments; or
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

is the debtor's principal residence" so long as the requirements of subsections (a) and (c) of section 1322 are met. See also H.R. Rep. No. 595, 95th Cong., 1st Sess. 124 n.47 (the statute departs from former law "by permitting a plan to affect debts secured by real property or chattels real"). Here, the plaintiff's claim was secured by more than a security interest in the debtors' principal residence; the plaintiff had security interests in the tanning equipment as well as in the debtors' home. The plaintiff does not contend that the requirements of section 1322(a) and (c) were not met.[3] Therefore, consistent with the statute, the plan could treat the plaintiff's claim as secured yet still modify the plaintiff's rights in the security. The plaintiff's assertion that the plan treated its claim as unsecured is simply not supported by the record.

The plaintiff argues that, regardless of the plan's treatment of its claim, confirmation of the plan could not destroy its liens. The bankruptcy court apparently disagreed. It reasoned that, under section 1327 of the bankruptcy code, the order of confirmation had vested title to the property in the debtors free and clear of any liens.

Section 1327 states:

> (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

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[3] Subsection (a) requires, among other things, that the plan "provide the same treatment for each claim within a particular class." Subsection (c) sets out time limits for payments under a plan.

> or not such creditor has objected to, has accepted, or has rejected the plan.
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
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> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

Apparently the bankruptcy court read section 1327 as destroying, by operation of law, any liens that had attached to the property of the estate before bankruptcy unless the plan expressly provided for continuation of the liens. Because, under the plaintiff's interpretation of the plan, the plan treated the plaintiff's claim as unsecured, the plaintiff asked the bankruptcy court to modify the plan to treat the claim as secured and (presumably) to provide for continuation of the plaintiff's liens.

Courts that have considered the question have generally concluded that confirmation of a plan that purports to treat a secured claim as unsecured does not destroy an otherwise valid lien. See, e.g., Simmons v. Savell (In re Simmons), 765 F.2d 547 (5th Cir. 1985). If the lien secures an allowed secured claim, the act of confirmation does not vest in the debtor any greater interest in the property of the estate than was vested in the estate when the bankruptcy petition was filed. Section 1327, the courts reason, was not meant to avoid otherwise valid liens by operation of law.

This court takes no issue with the cases the plaintiff

relies on. Rather, it finds them inapplicable in this case. The question is not the effect of the confirmation order on the validity of the plaintiff's liens but on the underlying claim. If that claim is extinguished, there is nothing for the liens to secure and hence nothing for them to attach to. Confirmation may not act to avoid a lien, but satisfaction of the underlying claim may. The question, then, is whether the plaintiff's claim was satisfied. The court concludes that the plaintiff is precluded from asserting it was not.

An order confirming a chapter 13 plan is res judicata as to all issues that were or could have been decided at the confirmation hearing. See, e.g., Anaheim S&L Ass'n v. Evans (In re Evans), 30 Bankr. 530, 531 (Bankr. 9th Cir. 1983); In re Russell, 29 Bankr. 332, 335 (Bankr. E.D.N.Y. 1983); Citizens Fed. S&L Ass'n v. Rose, 15 Bankr. 164, 165 (Bankr. S.D. Ohio 1981); Ford Motor Credit Co. v. Lewis (In re Lewis), 8 Bankr. 132, 137 (Bankr. D. Idaho 1981). The value of the property securing the plaintiff's claim was an issue that could have been decided at the confirmation hearing.[4] Indeed, the court was required to decide the issue at the confirmation hearing.

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[4] The issue may have in fact been decided at the confirmation hearing. See supra note 1. A transcript of the confirmation hearing is not part of the record on appeal, so this court cannot say whether the representation of the debtors' counsel is correct. However, the doctrine of res judicata (or, under current terminology, claim preclusion) not only bars relitigation of claims that were actually decided but also bars litigation of issues relevant to the parties' claims that could have been decided but were not. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4406 (1981).

The code provides that the value of a secured creditor's interest in property in which the estate has an interest "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a) (emphasis added). Because a chapter 13 plan may, under 11 U.S.C. § 1322(b)(2), affect the interests of a secured creditor such as the plaintiff, the bankruptcy court was required to determine the value of the plaintiff's interest in the tanning equipment and home in conjunction with the hearing to confirm the debtors' plan, if not before.[5]

Although it was ambiguous, the debtors' plan also put the plaintiff on notice that the valuation question would be decided at the confirmation hearing. It provided for surrender of the tanning equipment to the plaintiff and stated, "Testimony will/will not (indicate) be taken at the confirmation hearing to establish the fair market value of said property." ROA at 37. Debtors' counsel neglected to "indicate" whether or not testimony would be taken, but the court concludes that, when considered with section 506(a), the plan gave sufficient warning to the plaintiff to appear at the confirmation hearing if it wanted to contest the debtors' valuation of the equipment.

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[5] The plaintiff does not contend that the bankruptcy court decided the value of the equipment before the confirmation hearing, such as when it approved the parties' stipulation for the return of the equipment.

The order confirming the debtors' plan provided that "the value, as of the effective date of the plan, of certain collateral is as follows:" Next to the plaintiff's name, the order read, "Collateral to be surrendered in full satisfaction of the obligation." ROA at 52. The court concludes that implicit in the order of confirmation was a finding that the value of the tanning equipment was equal to the plaintiff's claim.[6] Otherwise, it is doubtful that the debtors' plan could have been confirmed.

A bankruptcy court may not confirm a chapter 13 plan unless it meets certain requirements. With respect to allowed secured claims provided for by the plan, the bankruptcy court may not confirm the plan unless--

> (A) the holder of such claim has accepted the plan;
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
> (C) the debtor surrenders the property securing such claim to such holder . . . .

11 U.S.C. § 1325(a)(5). Thus, before the bankruptcy court could confirm the debtors' plan, it had to find that it met the

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[6] The order is arguably ambiguous in that it refers to "Collateral," and the plaintiff's claim was secured not only by the tanning equipment but also by a junior lien on the debtors' residence. However, the court believes that the term "Collateral" in the order refers only to the tanning equipment, since that was the equipment that the parties agreed was to be surrendered to the plaintiff. It is not clear how one could "surrender" to a secured creditor a fourth lien on real property.

requirements of one of the subparagraphs of section 1325(a)(5)--(A), (B) or (C).

The plaintiff did not expressly accept the debtors' plan. On the other hand, the plaintiff never objected to the plan either. Thus, the requirement of subparagraph (A) was met only if the plaintiff's failure to object to the plan is deemed acceptance of the plan. It is doubtful that a failure to object would be deemed an acceptance. See In re Ruiz, 13 Bankr. 94 (Bankr. S.D. Fla. 1981) (where no acceptance has been filed there is no basis to impute consent to any creditor).

The debtors' plan may have met the requirements of subparagraph (C) in that it provided for surrender of the tanning equipment to the plaintiff. However, the tanning equipment was not the only equipment securing the plaintiff's claim. If the value of the tanning equipment was not sufficient to satisfy the claim, it is doubtful whether subparagraph (C) would apply. In essence, section 1325(a)(5) allows a plan that purports to provide for an allowed secured claim to be confirmed over the objection of a secured creditor only if the creditor is not hurt by the plan. If a creditor's claim is secured by liens on more than one piece of property, the creditor's position would be impaired if the debtor could impose a plan on the creditor merely by surrendering one of the items of collateral, unless, of course, that one item fully satisfied the creditor's claim. Thus, if section 1325(a)(5)(C) allows confirmation of the

debtors' plan, it is arguably because surrender of the tanning equipment alone fully satisfied the plaintiff's claim.

The plan might also have qualified for confirmation if it met the so-called cram-down provisions of section 1325(a)(5)(B). To meet the provisions of subparagraph (B), the plan must provide that the secured creditor retain his lien and must provide for distributions to the secured creditor equal to the full allowed amount of his secured claim.

The debtors' plan in this case did not provide that the plaintiff would retain its liens. In fact, it expressly contemplated an action to avoid the liens. No such action was ever filed. On the other hand, the plan also provided for surrender of the tanning equipment to the plaintiff. If the value of the tanning equipment was "not less than the allowed amount" of the plaintiff's claim, the "property to be distributed under the plan on account of" the plaintiff's claim would have fully satisfied that claim, and there would have been no need either to file an action to avoid the lien or to provide for retention of the lien in the plan. The lien would have been extinguished by satisfaction of the debt.[7]

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[7] This interpretation of section 1325(a)(5)(B) finds support in the legislative history of the bankruptcy code:

> [T]he secured creditor in a case under chapter 13 may receive any property of a value as of the effective date of the plan equal to the allowed amount of the creditor's secured claim rather than being restricted to receiving deferred cash payments. Of course, the secured creditors' lien only secures the value of the collateral and to the extent property is distributed of a present value equal to the allowed amount of the

In sum, the bankruptcy court could only confirm the debtors' plan if it met the requirements of section 1325(a)(5), and it appears that the debtors' plan could only have met the requirements of section 1325(a)(5) if the value of the tanning equipment was at least equal to the plaintiff's claim. The plaintiff never filed any objection to the plan, did not appeal the order confirming the plan and does not argue on appeal that the plan did not qualify for confirmation under section 1325. Therefore, the plaintiff is estopped from asserting that the plan did not meet the requirements of section 1325(a)(5), and implicit in the bankruptcy court's order confirming the plan is a finding that the value of the tanning equipment was at least equal to the plaintiff's claim.

If the value of the tanning equipment that the debtors surrendered to the plaintiff was at least equal to the plaintiff's claim, then surrender of the equipment satisfied that claim, and there would be no reason to amend the plaintiff's proof of claim. The court concludes that the plaintiff is estopped from asserting that surrender of the equipment did not

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> creditor's secured claim the creditor's lien will have been satisfied in full. Thus the lien created under section 1325(a)(5)(B)(i) is effective only to secure deferred payments to the extent of the amount of the allowed secured claim.

124 Cong. Rec. H11107 (daily ed. Sept. 28, 1978) (joint explanatory statement of congressional floor managers for the compromise bill that became the Bankruptcy Reform Act of 1978). reprinted in Appendix 3 Collier on Bankruptcy IX-1, IX-122 (L. King ed. 1987).

fully satisfy its claim. Because the debtors' plan therefore provided for full payment of the plaintiff's claim, there is no reason to modify the plan or to set aside the order of confirmation.

The plaintiff argues that the bankruptcy court erred by not giving effect to the stipulation between it and the debtors, in which the plaintiff said it was not waiving any rights. However, the stipulation merely allowed for the surrender and sale of the tanning equipment. It did not resolve the critical issue in this case, namely, the value of the equipment. The plaintiff implicitly recognized that fact when it subsequently filed a proof of claim for the full amount of its claim, without any reduction for the value of the tanning equipment. The value of the collateral had yet to be determined. The time for determining it was at the confirmation hearing. The plaintiff is precluded from now challenging the finding implicit in the confirmation order that the value of the beds satisfied the plaintiff's claim. That conclusion does not diminish the effect of the parties' prior stipulation in any way.

The plaintiff further suggests that the bankruptcy court should have set aside the confirmation order under Bankruptcy Rule 9024, which incorporates Federal Rule of Civil Procedure 60(b). Rule 60(b) allows a court to relieve a party from the effects of an order for various reasons, including "mistake, inadvertence, surprise, or excusable neglect." The motion must be filed "within a reasonable time," not to exceed one year in

the case of mistake or neglect. The plaintiff has not shown how the confirmation order was the product of mistake, inadvertence, surprise or excusable neglect. The only mistake involved was the plaintiff's mistake in checking the "unsecured" box on its proof of claim. However, as the court has concluded, that mistake did not affect the confirmation order because the debtors' plan essentially treated the plaintiff's claim as secured.

Moreover, the plaintiff's request, if viewed as a rule 60(b) motion, is clearly untimely. Bankruptcy Rule 9024 limits the time requirements of rule 60(b). Under rule 9024, "a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 or § 1330." A request under sections 1144 and 1330 must be made within 180 days after the entry of an order of confirmation. The confirmation order was entered on July 18, 1985. The plaintiff's complaint to set aside that order was filed on May 14, 1986, more than 180 days after the order of confirmation. To the extent the complaint seeks relief under rule 9024, the bankruptcy court did not err in dismissing the complaint as time barred.

Finally, the plaintiff suggests that, by including the plaintiff in some distributions under the plan, the debtors are estopped from denying that the plaintiff's claim has not been fully paid. For the reasons stated in this opinion, the court concludes that it is the plaintiff and not the debtors who are estopped. The record is replete with inconsistencies and errors by both sides, showing that, throughout the bankruptcy

proceedings, neither side always knew what it was doing. The plaintiff cannot complain if it has received a windfall through the debtors' ignorance or mistake.

III.

The court concludes that the bankruptcy court correctly dismissed the plaintiff's complaint. However, the effect of the order of confirmation was not, as the bankruptcy court suggested, to avoid an otherwise valid lien by operation of law. Rather, it was to preclude the plaintiff from now challenging, by collateral attack, the bankruptcy court's implicit valuation of the surrendered collateral. The plaintiff's lien did not survive confirmation of the plan because the underlying claim was satisfied, not because confirmation automatically avoids any lien.

The court's decision does not alter the rights of secured creditors. Secured creditors of a chapter 13 debtor do not have to file a proof of claim, and their lien can still survive bankruptcy. However, if a secured creditor elects to file a proof of claim and the debtor's plan purports to provide for that claim, the secured creditor ignores the plan and the confirmation hearing at his peril.

For the foregoing reasons, the order of the bankruptcy court dismissing the plaintiff's complaint is AFFIRMED.

IT IS SO ORDERED.

Dated this 6th day of September, 1988.

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BY THE COURT

BRUCE S. JENKINS
CHIEF JUDGE