

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE: MICHAEL and ANGELA LAURIDSEN,)
)
 Debtors.) CHAPTER 13
)
) CASE NO. 7-03-05038
)

MICHAEL and ANGELA LAURIDSEN,)
)
 Movants)
)
 v.) CONTESTED MATTER ON MOTION
) TO SELL FREE AND CLEAR OF
) LIENS
 WASHINGTON MUTUAL BANK, et als,)
 Respondents)

MEMORANDUM DECISION

The matter before the Court is the Debtors’ Motion to approve the sale of their residence property free and clear of liens. The particular question raised by the Motion is whether adequate notice has been given to permit the Court’s approval of the Motion.

FINDINGS OF FACT

The Motion was served upon the Chapter 13 Trustee, counsel of record for the first mortgage holder, the deed of trust trustee for that first mortgage lien, and the Treasurer of the City of Roanoke, which has a lien for any unpaid real estate taxes upon the property. The Motion and Notice of Hearing were not served on the creditor holding the second lien against the property or the trustee of that deed of trust, but counsel for the Debtors represents that the sale

proceeds will be more than sufficient to pay this debt in full. At the time of the bankruptcy case filing the property in question was also subject to a third deed of trust securing Empire Acceptance Corporation payment of indebtedness arising from the purchase and installation of vinyl siding for the residence. This creditor filed a proof of claim in this case asserting a secured claim in the amount of \$21,625.51. The Debtors filed an objection to this proof of claim on the ground that the amount was incorrect. This Objection was not responded to and therefore was sustained, the result of which was the allowance of a secured claim to Empire Acceptance in the amount of \$13,088.34. The confirmed Chapter 13 Plan of the Debtors provided that this claim would be paid in the full allowed amount plus interest at the rate of 9% per annum. Counsel for the Debtors represents, and this is confirmed by the Chapter 13 Trustee, that this allowed claim has since been paid in full by the Trustee by distributions from the Plan. Empire Acceptance has not released its deed of trust, however, and has provided a payoff quote to the settlement agent for the proposed transaction which reflects no recognition of the reduced amount of its claim as previously determined by this Court although such creditor never appealed from either the order sustaining the Debtors' objection to its original proof of claim or the order confirming the Chapter 13 Plan.

In addition to providing for payment of Empire Acceptance's secured claim in the amount of \$13,088.34 plus 9% interest. This Court's April 7, 2004 Order Confirming Plan further provided that each creditor having an "allowed secured claim[] provided for by the Plan . . . shall retain a lien during the pendency of this case." This order makes no provision that any of the Debtors' property shall remain property of the estate. It does provide that they shall not "dispose of any property out of the ordinary course of business without prior approval of the Trustee or by leave of Court." At the hearing on the Debtors' Motion, the Chapter 13 Trustee advised the Court

that she consented to the Motion. The Plan does not contain any provisions on these points inconsistent with the provisions of the order of confirmation.

The Motion and Notice of Hearing have not been served upon either Empire Acceptance or the trustees of the deed of trust securing its claim. Counsel for the Debtors represents that the proceeds of the transaction will not be sufficient to pay the full amount claimed by Empire Acceptance in the payoff quote it has provided to the settlement agent. The net proceeds of the transaction after payment of all liens and transaction expenses will be paid over to the Chapter 13 Trustee to apply to the Debtors' remaining obligations under the confirmed Plan but will not be sufficient to pay such obligations in full.

CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. A motion to sell property owned by a Chapter 13 debtor under the terms of a confirmed plan is a "core" bankruptcy matter pursuant to 28 U.S.C. § 157(b)(2)(N).

The legal effect of a confirmed chapter 13 plan is provided in 11 U.S.C. § 1327. Subsection (b) of that statute provides that "[e]xcept as otherwise provided in the plan or order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." The immediately following subsection of the statute further provides "[e]xcept as otherwise provided in the plan or 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." 11 U.S.C. § 363(f) provides that

The trustee¹ may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(b)(1) provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.”

The provisions of the confirmed Chapter 13 Plan do not contemplate the sale of the Debtors’ residence property as a means of fulfilling the terms of the Plan. Under the terms of the order of confirmation and the provisions of 11 U.S.C. § 1327(b), the residence property was vested back in the Debtors and was no longer “property of the estate,” except that the Debtors were prohibited from disposing of such property during the pendency of the bankruptcy case without obtaining either the consent of the Chapter 13 Trustee or the Court. A sale of one’s residence property is certainly a sale of property out of the ordinary course of business. Under these circumstances the Court concludes that the Debtors’ proposed sale of this property with the approval of the Court is within the authority provided by 11 U.S.C. §§ 363(b)(1) and 363(f).

The sale of the property free and clear of the first and second deeds of trust and the locality’s real estate tax lien is authorized by section 363(f)(3) because the net sale proceeds are more than enough to pay such liens in full. The order tendered by Debtors’ counsel provides that such liens shall be paid in full at closing from the sale proceeds, which certainly establishes as a

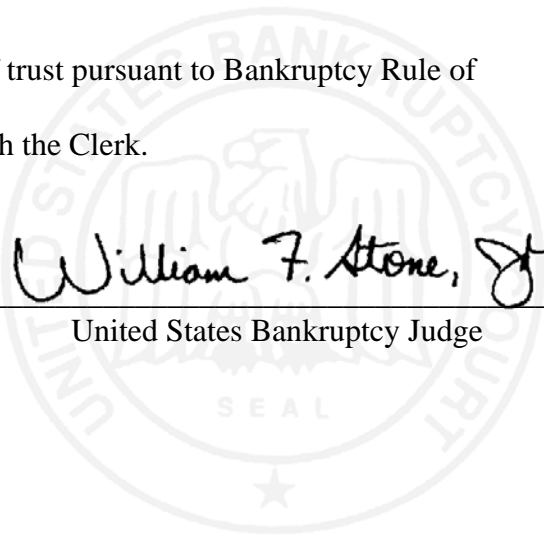
¹ “Subject to any limitations on a trustee under this chapter [i.e., chapter 13], the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), . . . 363(f) . . . of this title.” 11 U.S.C. section 1303.

practical matter that such condition has been met. If these liens are to be paid in full at closing, any issue as to a sale free and clear of such interests is effectively mooted. It certainly appears that Empire Acceptance has no valid remaining lien upon the subject property because the amount of its claim as of the date of filing has been previously determined by this Court under the terms of an order now long final and the Court is advised that such claim has been paid in full with interest. If the secured obligation has been paid, there is no outstanding indebtedness to support the lien of the deed of trust. Furthermore, under the provisions of section 1327(c) of the Bankruptcy Code, it seems that the residence property was vested back in the Debtors free and clear of Empire Acceptance's claim, subject only to the payment with interest of the determined amount of its claim, which is represented to have taken place already. *See Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 94 (4th Cir. 1995). In short, Empire Acceptance's lien appears to have been "provided for" in the Debtors' confirmed Chapter 13 Plan and paid in full. Nevertheless, it also appears that Empire Acceptance continues to claim that it is secured by the property. While the Court could approve the sale of the property under the authority of section 363(f)(4) even over Empire Acceptance's objection on the ground that the lien is subject to a "bona fide dispute," it questions its authority to sell property free and clear of an existing lien of record without providing to the holder of the lien an opportunity to object and be heard. Accordingly, the Court will approve the sale of the property free and clear of liens but provide that the order authorizing such shall be served upon the secured creditor and the trustees of the recorded deed of trust and give them a limited opportunity to file an objection thereto and be heard. An order to such effect has been entered.

The Clerk is directed to send copies of this memorandum decision to the Debtors, the Chapter 13 Trustee, the Office of the United States Trustee and counsel for the Debtors, the latter of whom shall promptly serve copies of same together with the order upon Empire

Acceptance Corporation and the trustees of its deed of trust pursuant to Bankruptcy Rule of Procedure 7004 and file a certificate to such effect with the Clerk.

This 24th Day of August, 2005.



William F. Stone, Jr.

United States Bankruptcy Judge