

In re Hopper, Case No. 21-70139 (Bankr. E.D.N.Y., August 5, 2021).

Issue:

How should a wholly unsecured junior mortgage lien for which the debtor no longer has personal liability as the result of a prior chapter 7 discharge be treated after being stripped pursuant to §§506, 1322 and 1325 in a pending chapter 13?

Facts:

Debtor received a chapter 7 discharge in 2009 which discharged her personal liability to a junior mortgage lien holder (“Real Time”). In January 2021, Debtor filed a chapter 13. Real Time’s *in rem* lien remained as a claim against the property. Debtor alleged there is no equity in her residence to secure the junior mortgage so it should be reclassified as unsecured. Debtor requested to fix the value of the unsecured claim at \$0 precluding Real Time from receiving any payment under the proposed plan which proposed to pay unsecured creditors 100% of their claims.

Analysis:

Underwater junior mortgage liens pass through the chapter 7 process unaffected by the discharge unless they have been disallowed under §502. A chapter 13 debtor may file a motion to strip off mortgage liens that are underwater per §1322(b)(2) as held by the Second Circuit in *In re Pond*, 252 F.3d 122 (2nd Cir. 2001). There is no binding authority on reducing that claim to \$0 or treating it as all other unsecured claims. Courts are divided and some hold that wholly unsecured junior mortgage lien must be treated as other nonpriority unsecured claimholders. They find that while stripping the lien under §1322 is permissible in a subsequent chapter 13, the dollar amount of the claim is unaffected by the lien stripping or prior discharge.

Other courts that permit debtors to reduce *in rem* claims to zero after stripping the lien rely on §524 to conclude that upon stripping the lien the underlying debt is not an allowed secured claim in a chapter 13 case because the lienholder may not resurrect its *in personam* rights once the lien is stripped. They also rely on the definition of creditor in §101(10) to limiting allowable unsecured claims to those that have not been discharged and the *in rem* claim that survived

the chapter 7 discharge would not be an allowed unsecured claim after the §506(a) motion rendered it valueless in the subsequent chapter 13.

The claim of Real Time is not barred; rather, it is barred from collecting its claim against the debtor personally. The secured *in rem* claim that remained is not a personal liability of the debtor nor does it become one upon the stripping of the lien. It is due and owing but uncollectable against Debtor personally. Section 101(12) does not distinguish personal from *in rem* liability when defining “debt” as “liability on a claim.” Further, §522(c) provides that the property remains liable during and after the case for debt secured by a lien that is not avoided under subsections (f) or (g), and not void under §506(d). So the obligation is uncollectible against the debtor personally but the *in rem* lien passes through the bankruptcy. Section 502 determines whether a claim is disallowed and none of the requirements are satisfied in this case.

The Code cannot be read in such a way to deprive Real Time of its bargained-for rights while giving it nothing in return. Debtor voluntarily sought relief under chapter 13 and may modify the rights of Real Time by stripping its lien, but is required to treat it the same as all unsecured creditors consistent with §1325(a)(4) (best interest of creditors test) and §1325(b) (disposable income test).

Holding:

Debtor's motion to strip off the lien of the junior unsecured mortgageholder is granted and denied as to the request to reduce the claim to \$0.

