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FOR PUBLICATION

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| ENTERED <u>AUG 25 2008</u> |
| FILED |
| AUG 25 2008 |
| CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY _____ DEPUTY |

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA

In re
JOHN AND ERIN PEREIRA,

Debtors.

Case No. 08-03059-B13

MEMORANDUM DECISION

I.
INTRODUCTION

John and Erin Pereira (“Debtors”) have proposed a chapter 13 plan of reorganization (“Plan”) which provides for the filing of an adversary proceeding to avoid the allegedly wholly unsecured second trust deed of National City Bank (“National City”). The chapter 13 trustee (“Trustee”) objects to this provision, arguing that he cannot administer the plan until he knows whether National City is to be treated as a secured or unsecured creditor. Debtors did not file a written response to the objection prior to the hearing. After considering post-hearing briefing supplied by each party, the Court sustains the Trustee’s objection to confirmation.

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1 44101-0570.” [Id.] The Debtors have not filed a certificate of service with the Court
2 reflecting any other service of the Plan or a notice of confirmation hearing.

3 Consistent with Plan ¶ 19, Debtors promptly commenced adversary proceeding
4 No. 08-90162 against “National City Mortgage Company”¹ to avoid the lien pur-
5 suant to § 1322(b)(2) (“Avoidance Action”). [Main Case Doc. #8; Adv. Proc. Doc.
6 #1] The adversary complaint alleges the Residence was valued at \$324,541.56 on the
7 date of the Order for Relief. [Adv. Proc. Doc. #1 at ¶ 10] The summons and
8 complaint were served on National City on April 22, 2008, at the following address:

9
10 National City Mortgage Company
11 Attn Legal Department
P.O. Box 1804
Dayton, OH 45401-1804

12 [Adv. Proc. Doc. #3] Thereafter, Debtors obtained an alias summons and on June 2,
13 2008, served the alias summons and complaint on National City at the following
14 address:

15
16 National City Mortgage Company
17 Peter Raskind, President
1900 East Ninth St
Cleveland, OH 44114

18 [Adv. Proc. Doc. #8]

19 National City has answered the complaint and specifically denied, *inter alia*,
20 that the Residence was valued at \$324,541.56 on the date of the Order for Relief; that
21 National City has no secured claim against the Residence; and that it is wholly
22 unsecured against the Residence. [Adv. Proc. Doc. #10 at ¶¶ 10, 12, 15-16]

23 The Trustee is the only party in interest to file an objection to confirmation of
24 the Plan.

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26 _____
27 ¹ The Chapter 13 plan was served on an entity called “National City Bank.” The adversary
28 complaint was filed against National City Mortgage Company as “National City.” Hereinafter, all
references to “National City” collectively refer to National City Bank and National City Mortgage
Company although the record is not clear that they are the same entities.

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IV.
DISCUSSION

In this circuit, a debtor may “strip off” a secured creditor’s wholly unsecured real property lien notwithstanding the language of § 1322(b)(2). *In re Zimmer*, 313 F.3d 1220, 1222 (9th Cir. 2002). Therefore, if a debtor can show that a putatively secured interest of a residential secured creditor is totally unsecured, the debtor has the ability to strip off the lien. *In re Millspaugh*, 302 B.R. 90, 96 (Bankr. D. Idaho 2003); *In re Geyer*, 203 B.R. 726, 729 (Bankr. S.D. Cal. 1996)(Adler).

It is procedurally unnecessary to file an adversary proceeding solely to strip off an allegedly wholly unsecured lien pursuant to § 1322(b)(2). *Millspaugh*, 302 B.R. at 98; *In re Sadala*, 294 B.R.180, 185 (Bankr. M.D. Fla. 2003); *see also* March, Ahart & Tchaikovsky, *Cal. Prac. Guide: Bankruptcy*, ¶ 18:110-113 at 18-10-11 (The Rutter Group 2007). These authorities agree that the appropriate procedure to strip off an allegedly wholly unsecured lien is to file a noticed motion pursuant to Federal Rules Bankruptcy Procedure (“Rule”) 3012 and 9014. They explain that extinguishment of a wholly unsecured lien is the inevitable by-product of valuation of collateral. Rule 3012 makes it clear that only a motion is required for this purpose. *Millspaugh*, 302 B.R. at 98; *Sadala*, 294 B.R. at 183; The Rutter Group, *Cal. Prac. Guide: Bankruptcy*, at ¶¶ 18:110 and 18:113. Alternatively, a debtor may strip off a lien through a chapter 13 plan by including a provision in the plan for valuation of the collateral and lien stripping as a matter related to confirmation of the plan. *Millspaugh*, 302 B.R. at 98; The Rutter Group, *Cal. Prac. Guide: Bankruptcy* at ¶ 18:111.

In the present case, the Trustee objects to the provision in Plan ¶ 19 to defer lien stripping to an adversary proceeding which will be determined sometime after confirmation. The Trustee argues that lien stripping should be accomplished preconfirmation because confirmation of the plan will “bind” the secured and unsecured treatment of the claims. He needs to be able to ascertain how he is

1 supposed to treat National City's claim in order to administer the Plan.

2 The Debtors recognize that lien stripping can be accomplished in a plan, or
3 preconfirmation through a noticed motion. Specifically, their Post-Hearing
4 Opposition provides:

5
6 As best explained "*Post Zimmer*" by the [c]ourt in *In re Millspaugh*, 302
B.R. 90, 2003 LEXIS 1779 (Bankr. D. Idaho 2003) at 103-104:

7 *In summary, a chapter 13 debtor may, in his plan or in a*
8 *separate (and usually preconfirmation) motion, seek to*
9 *strip off a creditor's wholly unsecured lien through a*
10 *valuation process under § 506(a) and Rules 3012 and*
11 *9014. An adversary proceeding is not required by Rule*
12 *7001(2) unless that debtor otherwise contests the validity,*
13 *extent or priority of the creditor's lien. However, the*
14 *nature and substance of the request to so treat the*
15 *creditor's claim and lien must be **clearly and***
16 ***conspicuously identified and explained in the plan or***
17 ***motion.** Service of the motion, or of the plan if the motion*
18 *is subjoined, must be made on that creditor as required by*
19 *Rule 7004. Assuming a proponent can show that these pre-*
20 *requisites are met, an order granting the motion may be*
21 *entered, either within a confirmation order or separately.*

22 [Main Case Doc. #26 at 6:5-20 (italics and bold in original)]

23 Notwithstanding, the Debtors argue that the adversary procedure will be
24 more "expeditious." [*Id.* at 7:4-14] The Court disagrees. As the court in *Sadala*
25 indicated, a noticed motion procedure is designed to provide a creditor with due
26 process in a streamlined and efficient manner. An adversary proceeding is more
27 formal, takes longer, and is more costly. *Sadala*, 294 B.R. at 183.

28 The Debtors' Post-Hearing Opposition illuminates their reasoning. They state
that, "but for the Trustee's objection, the Court would have confirmed the Chapter 13
plan ... and the fair market value of the residence would have been established by
court order to be \$324,541.56." [Doc. #26 at 7:6-8] Because the amount owed on the
first trust deed exceeds this value, the Debtors believe they could quickly resolve the
adversary proceeding through a motion for summary judgment if National City
refused to stipulate to strip off the lien. [*Id.* at 7:8-11]

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1 Thus, the Debtors believe the Residence will be valued pursuant to § 506(a)
2 in connection with confirmation of their Plan and that such valuation will be binding
3 and conclusive for purposes of the adversary proceeding. Then, the sole matter to
4 be litigated in the adversary proceeding will be a straightforward motion for summary
5 judgment to strip off the lien based upon the amount owed on the first trust deed and
6 the value of the Residence established at the confirmation hearing. It is puzzling why
7 Debtors would file a formal adversary proceeding just to file a motion for summary
8 judgment to strip off the lien when they could seek to strip the lien at the confirmation
9 hearing or by noticed motion..

10 Regardless, it is obvious the affected persons have not been afforded proper
11 due process of the valuation hearing. Had the Trustee understood the valuation
12 hearing was to take place concurrently with confirmation, there would have been no
13 need for him to object to confirmation of the Plan. Likewise, had National City
14 understood the valuation hearing was taking place concurrently with confirmation,
15 it would have almost certainly objected to the Plan. In light of National City's answer
16 to the adversary complaint, Debtors cannot seriously believe National City agrees
17 their second trust is wholly unsecured.

18 Where (as here) a debtor seeks to value collateral in connection with a plan of
19 reorganization, the burden falls squarely upon the debtor as the drafter of the plan to
20 make the intention to value the collateral within the plan, and the factual basis for the
21 valuation of the collateral, clear to the affected creditors. *Millspaugh*, 302 B.R. at
22 99-100. Here, the Plan provides the Debtors will be filing an adversary proceeding
23 to avoid National City's second deed of trust. The logical function of the adversary
24 proceeding is to value the collateral to show the lien is wholly unsecured.²

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27 ² The adversary complaint alleges: it is to determine the "validity" of a security interest [¶
28 5]; the Residence was valued at \$324,541.56 on the date of the Order for Relief [¶ 10]; and National
City is wholly unsecured so it has no secured claim [¶¶ 12, 15 and 16].

1 Moreover, even if the Plan's treatment were clear, the Court cannot confirm the
2 Plan due to improper service of the Plan on National City. Both the Rules and
3 considerations of due process require that a chapter 13 plan which seeks to value
4 collateral must be served on the affected creditors in accordance with Rule 7004.
5 *Millspaugh*, 302 B.R. at 102-3. Simply mailing a plan and notice of confirmation
6 under Rule 2002 will not suffice. *Id.* at 102-3.

7 The record shows the Plan was mailed to "National City Bank" at a post office
8 box. The service was not directed to the attention of anyone at National City; nor
9 was it separately served on a designated agent for service of process. *See e.g.* Rule
10 7004(b)(3); *see also* Fed. R. Civ. P. 4 (h).³ National City was not served with the
11 Plan and a notice of hearing in compliance with Rule 7004.

12 The Debtors' Post-Hearing Brief argues the Rule 7004-compliant service was
13 accomplished when they *served the summons and adversary complaint*. [Main Case
14 Doc. #26 at 4:20-23; 6:24-25] They state that the adversary complaint "reiterated the
15 provisions of paragraph 19 in much more detail," so National City was well aware of
16 the provision. [*Id.*]⁴ Debtors' attorney regularly appears before this Court in
17 consumer bankruptcy cases and adversary proceedings. He is aware of the
18 independent functions of a hearing to confirm a chapter 13 plan of reorganization and
19 an adversary proceeding. He cannot seriously contend proper service of the
20 summons and complaint in an adversary proceeding cures his improper service of a
21 chapter 13 plan and notice of confirmation hearing.⁵

22 The Court holds that whenever a chapter 13 plan proposes to strip off a lien,
23 the treatment must be clearly and conspicuously stated in the plan. Moreover, it is not

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25 ³ Further, the record is not clear that National City Bank and National City Mortgage
Company are the same entities.

26 ⁴ In actuality, there is no reference to Plan ¶ 19, or any of its provisions, anywhere in the
27 adversary complaint.

28 ⁵ Counsel is reminded of his responsibilities under Rule 9011(b).

1 enough to serve just the plan on the affected creditors. The debtor must serve each
2 affected creditor with the chapter 13 plan and a notice of the valuation hearing (either
3 separately or conjoined with the notice of confirmation hearing), in compliance with
4 Rule 7004. The notice must clearly and conspicuously set forth the proposed
5 treatment to value the collateral and strip off the lien, and the time and date of the
6 hearing along with the deadline to object. It must be clear that the failure to object
7 will be deemed consent to the valuation of the collateral as stated in the plan.
8 *Millspaugh*, 302 at 102. The ultimate responsibility of proper drafting and proving
9 notice was properly given and that the relief is warranted, is on the debtor. *Id.* at 103.

10 **III.**

11 **CONCLUSION**

12 The Court sustains the Trustee's objection to Plan ¶ 19. The matter of stripping
13 off National City's allegedly wholly unsecured lien should be litigated prior to, or in
14 connection with the hearing on confirmation of the Plan because the Trustee needs
15 to know how to treat the claim to administer the plan. Additionally, the Plan needs
16 to clearly and conspicuously specify when the § 506(a) hearing to value the
17 Residence will take place. Finally, National City was not served with the Plan or a
18 notice of hearing in compliance with Rule 7004. As such, it has not been properly
19 notified of the valuation hearing.

20 The Trustee shall prepare and lodge an order in accordance with this
21 Memorandum Decision within ten days of its entry.

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24 Dated: 25 Aug 08

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LOUISE DE CARL ADLER, Judge