

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re
Glen Jay Blosser,

Debtor.

Chapter 13
Case No. 07-28223-svk

Glen Jay Blosser,

Plaintiff,

v.

Adversary No. 08-2353

KLC Financial, Inc.,

Defendant.

**DECISION AND ORDER
DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION TO DISMISS COMPLAINT**

The Debtor-Plaintiff filed a Complaint (actually this is his second Complaint, the first was dismissed for failure to comply with the pre-trial Order) to avoid a second mortgage lien on his residence because the amount of the first mortgage exceeds the value of the residence. The Defendant admits that the mortgage lien is "under water" but contends that the lien may not be avoided because the Debtor is not eligible for a Chapter 13 discharge in this case. The Debtor filed a Chapter 7 case on July 27, 2006, received a discharge on November 6, 2006 and filed this Chapter 13 case on November 16, 2007. According to the Defendant, a debtor who does not qualify for a Chapter 13 discharge cannot proceed under § 506 of the Bankruptcy Code to avoid liens. The Debtor was given an opportunity to respond to this argument, but chose not to do so.

The Defendant relies on Judge Gorman's decision in *In re Jarvis*, 390 B.R. 600 (Bankr. C.D. Ill. 2008), which is directly on point. In that case, the debtor had received a Chapter 7 discharge and within four years filed a Chapter 13 case and attempted to avoid a second mortgage lien on his residence. Judge Gorman noted that the ability of debtors to "strip off" liens in Chapter 13 cases is contingent upon the debtor completing the plan and receiving a discharge. *Jarvis*, 390 B.R. at 604 (citing *In re King*, 290 B.R. 641 (Bankr. C.D. Ill. 2003)). However, after BAPCPA, debtors are not eligible to receive a Chapter 13 discharge if the debtor received a Chapter 7 discharge in a case filed during the 4-year period preceding the Chapter 13 petition. 11 U.S.C. § 1328(f). According to Judge Gorman, "A no-discharge Chapter 13 case may certainly be utilized to obtain the protections of the automatic stay for the purpose of proposing a plan to make payments on debts. A no-discharge Chapter 13 case may not, however, result in a permanent modification of a creditor's rights where such modification has traditionally only been achieved through a discharge and where such modification is not binding if a case is dismissed or converted." *Jarvis*, 390 B.R. at 605-606. Judge Gorman concluded that

due to his recent Chapter 7 discharge, the debtor's Chapter 13 plan proposing to avoid the lien could not be confirmed.

The *Jarvis* reasoning is compelling because allowing a debtor to file Chapter 7, discharge all dischargeable debts and then immediately file Chapter 13 to strip off a second mortgage lien would not be much different than simply avoiding the mortgage lien in the Chapter 7 itself. But Chapter 7 debtors are not allowed to use § 506 to avoid liens. *Dewsnup v. Timm*, 502 U.S. 410 (1992). Moreover, lien stripping under these circumstances does not appear to comport with Congressional intent, as evidenced by the 4-year bar between a Chapter 7 discharge and eligibility for a Chapter 13 discharge, and the provisions allowing avoided liens to "spring back" on conversion or dismissal of the Chapter 13 case. 11 U.S.C. §§ 348(f)(1)(C), 349(b)(1)(C).

The only difference between this case and *Jarvis* is the Debtor's use of an adversary proceeding rather than a plan provision to attempt to avoid the lien. The Debtor's plan makes no mention of the Defendant, KLC, and thus, KLC's lien would have survived but for the adversary proceeding. See *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991); *In re Simmons*, 765 F.2d 547, 555 (5th Cir. 1985); *In re Stovall*, 256 B.R. 490, 492 (Bankr. N.D. Ill. 1999) (liens pass through bankruptcy unaffected unless they are brought into the bankruptcy and proceeding and dealt with there, citing *In re Penrod*, 50 F.3d 459 (7th Cir. 1995)). Since avoidance of the lien is contingent upon a Chapter 13 discharge, and the Debtor does not qualify for a Chapter 13 discharge, the Complaint fails to state a claim upon which relief can be granted, and should be dismissed. The format of this lien avoidance attempt cannot save it from this fatal flaw.


For the foregoing reasons,

IT IS THEREFORE ORDERED: the Debtor-Plaintiff's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED: the Defendant's Motion to Dismiss the Complaint is granted, and this Adversary Proceeding is dismissed, with prejudice.

Date: April 15, 2009

By the Court:


Susan V. Kelley
U.S. Bankruptcy Judge