



Signed: June 25, 2010

A large, stylized handwritten signature in black ink, appearing to read "Edward D. Jellen".

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 10-40503-EDJ
Chapter 13
VICKI TRAN,
Debtor./

In re No. 10-41032-EDJ
Chapter 13
LORNA BENNETT,
Debtor./

DECISION

Martha Bronitsky, chapter 13 Trustee (the "Trustee"), has objected to the chapter 13 plan filed by Vicki Tran, one of the above debtors ("Tran"), and has also requested dismissal of Tran's chapter 13 case. The Trustee has also objected to the chapter 13 plan filed by Lorna Bennett ("Bennett"), but has not requested dismissal. Because the Trustee's objections raise a legal issue common to both of these unrelated chapter 13 cases, the court will address the Trustee's objections in a single opinion, but issue separate orders.

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Decision

1 The court will dismiss Tran's chapter 13 case on the ground
2 that it was not filed in good faith. The court will overrule the
3 Trustee's objection to Bennett's chapter 13 plan, but declines to
4 confirm the plan in its present form.

5 A. Background - Tran

6 The facts relevant to Tran's chapter 13 case are undisputed.
7 On March 3, 2009, Tran filed a chapter 7 petition herein, and in due
8 course, received her general discharge on June 2, 2009. On January
9 17, 2010, less than four years later, Tran filed a chapter 13
10 petition herein. In her bankruptcy schedules, Tran listed no
11 general unsecured claims and no priority unsecured claims.

12 At the date of the chapter 13 petition, Tran owned a residence
13 in Newark, California (the "Tran Residence") that she valued at
14 \$434,000. The Tran Residence was then subject to a first deed of
15 trust in favor of Washington Mutual Bank ("WAMU") to secure a debt
16 in the sum of \$459,991, and a second deed of trust in favor of WAMU
17 to secure a debt in the sum of \$80,900. Thus, at the petition date,
18 the first deed of trust was undersecured by \$25,991 and the second
19 deed of trust was wholly unsecured.

20 At that date, Tran also owned another parcel of real property
21 in San Jose, California that was overencumbered, and a motor vehicle
22 worth some \$13,000 subject to a security interest that secured a
23 debt in the sum of \$6,000.

24 Tran's proposed chapter 13 plan provides for 60 monthly
25 payments to the Trustee in the sum of \$375. The payments will be
26 applied to cure two delinquent mortgage payments and pay real

1 property taxes on the Tran Residence, and to pay the Trustee's fees
2 and fees for Tran's counsel. Tran will surrender the San Jose
3 property. The plan also provides that Tran will file a motion
4 seeking to "strip off" WAMU's second deed of trust on the Tran
5 Residence.

6 Tran concedes that, because she filed her chapter 13 petition
7 less than four years after receiving her discharge in the prior
8 chapter 7 case, she is not eligible for a discharge herein. This is
9 so by virtue of Bankruptcy Code § 1328(f)(1),¹ which provides, in
10 relevant part as follows:

11 (f) Notwithstanding subsections (a) and (b), the court
12 shall not grant a discharge of all debts provided for in
13 the plan or disallowed under section 502, if the debtor
14 has received a discharge--

15 (1) in a case filed under chapter 7, 11, or 12 of this
16 title during the 4-year period preceding the date of the
17 order for relief under this chapter . . .

18 The Trustee contends that Tran may not strip off the second
19 deed of trust in a chapter 13 case in which the debtor is ineligible
20 for a discharge, and that there is no valid reason for this chapter
21 13 case.

22 B. Background - Bennett

23 The facts relevant to Bennett's chapter 13 case are undisputed.
24 On August 31, 2009, Bennett filed a chapter 7 petition herein, and
25 in due course, received her general discharge on December 17, 2009.
26 On January 30, 2010, less than four years later, Bennett filed a

¹All further section references herein are to the Bankruptcy
Code, 11 U.S.C. § 101 et. seq.

1 chapter 13 petition herein.

2 In her bankruptcy schedules, Bennett listed general unsecured
3 claims totaling \$93,045 (excluding any unsecured claims that result
4 from any lien strip-offs). At the date of the chapter 13 petition,
5 Bennett owned a residence in Union City, California (the "Bennett
6 Residence") that she valued at \$431,000. The Bennett Residence was
7 then subject to a first deed of trust in favor of Countrywide Loans
8 ("Countrywide") to secure a debt in the sum of \$589,630, and a
9 second deed of trust in favor of Countrywide to secure a debt in the
10 sum of \$107,000. Thus, at the petition date, the first deed of
11 trust was undersecured by \$162,170 and the second deed of trust was
12 wholly unsecured.

13 At that date, Bennett also scheduled an interest in three
14 additional parcels of real property. Bennett's proposed chapter 13
15 plan provides for Bennett to surrender her interest in two of these
16 parcels, but retain her residence and another parcel she refers to
17 as the "children's home." The children's home is overencumbered to
18 the extent of approximately \$200,000, and produces no income.

19 Bennett scheduled a full or partial interest in five motor
20 vehicles, one of which she proposes to surrender under the plan.

21 Under the plan, Bennett is to pay the Trustee \$1,105 for four
22 months and \$1,500 for an additional 56 months. These payments will
23 produce no return to any unsecured claimants.

24 Bennett concedes that, because she filed her chapter 13
25 petition less than four years after receiving her discharge in the
26 prior chapter 7 case, she is not eligible for a discharge herein.

1 Section 1328(f)(1).

2 The Trustee contends that Bennett may not strip off the second
3 deed of trust in a chapter 13 case in which the debtor is ineligible
4 for a discharge, and on that basis, has objected to confirmation of
5 Bennett's proposed chapter 13 plan.

6 C. Lien Stripping in Chapter 13 Cases - Backdrop

7 Section 506(a) provides:

8 An allowed claim of a creditor secured by a lien on
9 property in which the estate has an interest . . . is a
10 secured claim to the extent of the value of such
11 creditor's interest in the estate's interest in such
12 property . . . and is an unsecured claim to the extent
13 that the value of such creditor's interest . . . is less
14 than the amount of such allowed claim. . .

15 Thus, a claim's status as a secured claim, and the amount of the
16 secured claim, depends upon the value of the property to which the
17 lien in question attaches, and the amount of any senior liens. To
18 the extent that a lien does not attach to any value, it is void by
19 operation of § 506(d), which provides: "To the extent that a lien
20 secures a claim against the debtor that is not an allowed secured
21 claim, such lien is void . . . [several exceptions not relevant here
22 follow]."

23 Section 506(d), however, is subject to several exceptions
24 beyond those specified in that section. In Dewsnup v. Timm, 502
25 U.S. 410, 112 S.Ct. 773 (1992), the Supreme Court held, based on
26 pre-Code practice, that a chapter 7 debtor may not avoid all or any
portion of a lien on real property pursuant to Bankruptcy Code
§ 506(d), even though the lien is partially or wholly unsecured
based on the value of the property and the amount of any senior

1 liens. Id. at 417; see also In re Enewally, 368 F.3d 1165, 1169
2 (9th Cir. 2004).

3 Dewsnup, however, is inapplicable to chapter 13. Enewally, 368
4 F.3d at 1170.² But in chapter 13 cases, § 506(a) and (d) is
5 qualified by § 1322(b)(2), which provides that a chapter 13 plan may
6 "modify the rights of holders of secured claims, other than a claim
7 secured only by a security interest in real property that is the
8 debtor's principal residence"

9 In Nobelman v. American Savings Bank, 508 U.S. 324, 113 S.Ct.
10 2106 (1993) the Supreme Court construed this language to prohibit a
11 chapter 13 debtor from using § 506(a) and (d) to strip off the
12 undersecured portion of a lien on the debtor's principal residence.
13 The Supreme Court reasoned that partially secured lienholders are
14 "holders of secured claims," and that the "rights of holders of
15 secured claims" include the right to protection against lien
16 modification afforded by § 1322(b)(2).

17 _____
18 ²In Enewally, the Ninth Circuit stated:

19 The rationales advanced in the Dewsnup opinion for
20 prohibiting lien stripping in Chapter 7 bankruptcies,
21 however, have little relevance in the context of
22 rehabilitative bankruptcy proceedings under Chapters
23 11, 12 and 13, where lien stripping is expressly and
24 broadly permitted, subject only to very minor
25 qualifications. The legislative history of the Code
26 makes clear that lien stripping is permitted in the
reorganization chapters.

368 F.3d at 1170, citing Bartee v. Tara Colony Homeowners Ass'n
(In re Bartee), 212 F.3d 277, 291 n. 21 (5th Cir. 2000).

1 But Nobelman is not the end of the story regarding lien
2 stripping in chapter 13. In In re Zimmer, 313 F.3d 1220 (9th Cir.
3 2002), the Ninth Circuit held that the rationale of Nobelman and
4 § 1322(b)(2)'s protection against lien modification do not apply
5 when a lien on a debtor's principal residence does not attach to any
6 value, and thus, when a lienholder is not the "holder of a secured
7 claim" by operation of § 506(a). For example, this would be the
8 case with respect to a junior lien on a residence if the amount of a
9 senior lien on a residence exceeds the value of the residence.

10 Thus, notwithstanding Nobelman and § 1322(b)(2), a chapter 13
11 debtor may utilize § 506(a) and (d) to strip off a lien on the
12 debtor's principal residence, if the lien is completely unsecured
13 based on the value of the residence and the amount of any senior
14 liens.

15 D. Lien Stripping in No-discharge Chapter 13 Cases

16 The Trustee contends that chapter 13 debtors that are
17 ineligible for a discharge, such as Tran and Bennett, may not
18 utilize § 506(a) and (d) to strip off a lien on the debtor's
19 principal residence, even if the lien is completely unsecured.
20 There are a number of bankruptcy court decisions that so hold or so
21 state. See In re Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. 2008); In
22 re Mendoza, 2010 WL 736834 (Bankr. D. Colo. 2010); In re Blosser,
23 2009 WL 1064455 (Bankr. E.D. Wis. 2009); In re Winitzky, No. 1:08-
24 bankruptcy-19337-MT (Bankr. C.D. Cal. 2009). Several decisions,
25 however, hold to the contrary. See Hart v. San Diego Credit Union,
26 No. 09CV1017 JLS (POR) (S.D. Cal. 2010); In re Casey, 2010 WL

1 1766372 (Bankr. S.D. Cal. 2010).

2 This court agrees with the decisions holding that the
3 Bankruptcy Code does not condition a chapter 13 debtor's right to
4 strip off a wholly unsecured junior lien on the debtor's eligibility
5 for a discharge. Rather, such right is conditioned on the debtor's
6 obtaining confirmation of, and performing under, a chapter 13 plan
7 that meets all of the statutory requirements. At the same time, the
8 court emphasizes that if a chapter 13 case is filed primarily to
9 avoid a junior lien in an effort to skirt the Supreme Court's
10 holding in Dewsnup, then such filing would not be in good faith, and
11 such a case should be dismissed.

12 The starting point for statutory interpretation is the language
13 of the statute. United States v. Ron Pair Enterprises, Inc., 489
14 U.S. 235, 241 (1989); Kaiser Aluminum & Chemical Corp. v. Bonjorno,
15 494 U.S. 827, 835 (1990). In this respect, it is significant that
16 § 109(a), (e), and (g), which sets forth the eligibility
17 requirements for chapter 13, does not condition a debtor's
18 eligibility for relief under chapter 13 on the debtor's eligibility
19 for a discharge. Nor does § 109 preclude chapter 13 relief to a
20 debtor that has recently received a discharge in chapter 7. Johnson
21 v. Home State Bank, 501 U.S. 78, 11 S.Ct. 2150 (1991).

22 It is equally significant that, although § 1325(a) and (b) sets
23 forth numerous requirements for confirmation of a chapter 13 plan,
24 nothing in § 1325 conditions confirmation on the debtor being
25 eligible for a discharge.

26 /////

1 Moreover, nothing in § 506, § 1322, or any other section of the
2 Bankruptcy Code provides that a chapter 13 debtor's right to modify
3 or strip off liens is conditioned on the debtor being eligible for a
4 discharge.

5 Section 349(b)(1)(C) provides that a dismissal of a bankruptcy
6 case "reinstates . . . any lien avoided under section 506(d) of this
7 title." But a chapter 13 case in which a debtor completes a
8 confirmed plan is "closed," not "dismissed" at the conclusion of the
9 plan. Section 350(a);³ Fed.R.Bankr. 5009. Similarly,
10 § 1325(a)(5)(B)(i)(II) conditions any permanent lien modification of
11 a secured claim, not on a discharge, but rather, on completion of a
12 debtor's chapter 13 plan.⁴

13 Even so, there are, to date, at least four bankruptcy court
14 cases that looked beyond the Bankruptcy Code's language to support a
15 contrary view. The most often cited of these cases is In re Jarvis,
16 390 B.R. 600 (Bankr. C.D. Ill. 2008). In Jarvis, the court held
17 that "[c]onsistent with its past practice, this Court also holds
18 that the lien-avoiding effect of the confirmed plan, while
19 established at confirmation, is contingent upon a discharge pursuant

20
21 ³Section 350(a) provides: (a) After an estate is fully
22 administered and the court has discharged the trustee, the court
23 shall close the case.

24 ⁴Section 1325(a)(5)(B)(i)(II) provides that "if the case
25 under this chapter is dismissed or converted without completion
26 of the plan, such lien shall also be retained by such holder to
the extent recognized by applicable nonbankruptcy law." (Emphasis
added.)

1 to Section 1328." Apart from "past practice," the primary
2 authorities cited by Jarvis were In re Lilly, 378 B.R. 232 (Bankr.
3 C.D. Ill. 2007) and In re King, 290 B.R. 641 (Bankr. C.D. Ill.
4 2003), cases out of the same district.

5 Lilly, however, dealt with the rights of "holders of secured
6 claims" and § 1325(a)(5)(B)(i)(I)(bb), which expressly conditions
7 any permanent modification of the rights of a holder of a secured
8 claim on either full payment of the underlying contractual debt or
9 the debtor receiving a "discharge under section 1328."⁵ The holder
10 of a lien that is wholly unsecured, however, is not the holder of a
11 secured claim. In re Zimmer, 313 F.3d at 1225-26. Thus, Jarvis's
12 reliance on Lilly is misplaced. (The Jarvis court acknowledged that
13 Lilly was distinguishable because the liens at issue therein, unlike
14 the liens at issue in Jarvis, were secured claims under § 506(a).
15 Jarvis, 390 B.R. at 605.)

16 /////

18 ⁵Section 1325(a)(5)(B)(i)(I)(bb) provides, in relevant part:
19 (a) Except as provided in subsection (b), the court
20 shall confirm a plan if--
21 (5) with respect to each allowed secured claim provided
22 for by the plan--
23 (A) the holder of such claim has accepted the plan;
24 (B)(i) the plan provides that--
25 (I) the holder of such claim retain the lien securing
26 such claim until the earlier of--
(aa) the payment of the underlying debt determined
under nonbankruptcy law; or
(bb) discharge under section 1328 . . .

1 The other decision on which Jarvis is based is King. King
2 however, upheld a chapter 13 debtor's right to strip off a wholly
3 unsecured lien, King, 290 B.R. at 643, and the debtor therein was
4 eligible for a discharge. King, 290 B.R. at 651. Thus, although
5 the King court did state in its concluding paragraph that the lien
6 avoiding effect of the plan was contingent upon the debtor receiving
7 a discharge, this was purely dictum, and not at issue in the case.

8 The other cases cited by the Trustee are equally unpersuasive.
9 The Blosser decision merely followed Jarvis, finding its reasoning
10 "compelling." Mendoza relies on Jarvis and an unpublished decision,
11 In re Winitzky, No. 1:08-bankruptcy-19337-MT (Bankr. C.D. Cal.
12 2009). Winitzky focused on the argument that stripping off a lien
13 would deprive a lienholder of the lienholder's right of redemption
14 (when there is one under nonbankruptcy law), and possibly other
15 rights, when a case might end up being converted or dismissed prior
16 to full plan performance. The Winitzky court also reasoned that
17 "[i]f a court could strip a lien, with res judicata effect, without
18 issuing a discharge, it would create a special 'lien discharge'
19 where a debtor would still be liable for a debt but the creditor
20 could not enforce that debt with the bargained for lien." Winitzky
21 at 6.

22 Respectfully, this court declines to follow Winitzky and
23 Mendoza. Permitting a chapter 13 debtor in a no-discharge case to
24 strip off of a junior lien would not deprive the lienholder of its
25 right of redemption during the course of the chapter 13 proceeding,
26 if for example, the holder of a senior lien were to obtain relief

1 from § 362(a)'s automatic stay. This is so because, as stated
2 above, the court can condition any permanent modification or
3 stripping on the debtor's performance and completion of the debtor's
4 chapter 13 plan.⁶ And if such a chapter 13 case is dismissed or
5 converted to chapter 7 prior to full plan performance, the lien
6 would remain intact, under § 349(b)(1)(C) in the case of a
7 dismissal, or under Dewsnup in the case of a conversion to chapter
8 7.

9 Moreover, a chapter 13 debtor who has received a chapter 7
10 discharge and strips off a junior lien would not put the lienholder
11 in the position feared by the Winitzky court where the debtor is
12 "liable for the debt" as a personal liability but without the
13 creditor having any accompanying lien rights. This is so by virtue
14 of § 524(a), under which such a debtor would have no personal
15 liability for a debt discharged in an earlier chapter 7 case. And
16 this court declines to go along with the suggestion in Winitzky that
17 such a discharged personal liability would somehow spring back to
18 life when a debtor seeks to value the property at issue in a
19 subsequent chapter 13 case. Winitzky at 6 fn. 6.

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21 _____

22 ⁶This district has adopted Guidelines for Valuing and
23 Avoiding Liens in Individual Chapter 11 Cases and Chapter 13
24 Cases. The Guidelines state that a judgment avoiding a lien is
25 not to be entered prior to plan completion and entry of a
26 discharge. The Guidelines also state, however, that a discharge
is a prerequisite to lien avoidance. In this latter regard, the
court believes the Guidelines are in error, and will recommend
that they be amended.

1 Thus, nothing in the Bankruptcy Code precludes a debtor that is
2 not eligible for a discharge from filing a chapter 13 case,
3 obtaining confirmation of a chapter 13 plan, and with the exception
4 of the right to a discharge, from enjoying all of the rights of a
5 chapter 13 debtor, including the right to strip off liens. This
6 court finds the decisions to the contrary unpersuasive.
7 Accordingly, this court holds that the Bankruptcy Code does not
8 prohibit strip off of a wholly unsecured junior lien in a chapter 13
9 case, merely because the debtor is ineligible for a discharge under
10 § 1328(f)(1).

11 E. Objection to Confirmation - Tran

12 It does not automatically follow from the foregoing that Tran
13 is entitled to an order confirming her chapter 13 plan. Under
14 § 1325(a)(5), the court may not confirm a chapter 13 plan absent a
15 finding that the "plan has been proposed in good faith and not by
16 any means forbidden by law." Under § 1307(c), the court may dismiss
17 a chapter 13 case for "cause." "Cause," in turn, includes a filing
18 in bad faith. In re Eisen, 14 F.3d 469, 470 (9th Cir. 1994); In re
19 Morimoto, 171 B.R. 85, 86 (9th Cir. BAP 1994).

20 "Bad faith," as cause for dismissal pursuant to § 1307(c),
21 depends on the totality of the circumstances, but certainly includes
22 unfair manipulation of the Bankruptcy Code. Eisen, 14 F.3d at 470;
23 In re Warren, 89 B.R. 87, 90-91 (9th Cir. BAP 1988). Cf. In re
24 Leavitt, 171 F.3d 1219, 1224-25 (9th Cir. 1999) (regarding test for
25 a dismissal "with prejudice" pursuant to Bankruptcy Code § 349(a)
26 grounded on bad faith).

1 Here, the totality of the circumstances shows that Tran filed
2 this chapter 13 case solely for purposes of avoiding the second deed
3 of trust under circumstances where such avoidance was not available
4 to her in chapter 7, and where no independent reason exists for her
5 subsequent chapter 13 filing. See In re Warren, 89 B.R. at 95 (9th
6 Cir. BAP 1988) (holding that the court should not confirm chapter 13
7 plans "that are in essence veiled chapter 7 cases"); In re Caldwell,
8 895 F.2d 1123, 1126 (6th Cir. 1990).

9 Under Tran's proposed chapter 13 plan, only a relatively small
10 amount of arrearages on the debts secured by the first deed of trust
11 are to be cured. No tax debts or other prepetition unsecured
12 priority claims are to be paid; there are none.

13 It is true that a chapter 13 plan need not return a meaningful
14 dividend to general unsecured claimants as a condition to
15 confirmation. However, as the Ninth Circuit stated in In re Goeb,
16 675 F.2d 1386, 1391 (9th Cir. 1982), "Nominal-repayment is one piece
17 of evidence that the debtor is unfairly manipulating chapter 13 and
18 therefore acting in bad faith."

19 Moreover, Tran is solvent in a balance sheet sense, and her
20 monthly expenses are less than her monthly income.

21 In short, the totality of the circumstances show that this
22 case, as a chapter 13 case, is nothing other than an attempt by Tran
23 to unfairly manipulate the Bankruptcy Code to skirt the Supreme
24 Court's holding in Dewsnup, and thus, was not filed in good faith.
25 It is also clear that this case is of absolutely no benefit to
26 Tran's remaining creditors.

1 It follows that dismissal pursuant to § 1307(c) is in order,
2 and is the remedy that would be in the best interest of Tran's
3 creditors and the estate.⁷

4 F. Objection to Confirmation - Bennett

5 Although the Trustee has argued that Bennett's ineligibility
6 for a discharge precludes her from stripping off any liens on her
7 residence, the Trustee concedes that Bennett has a valid need for
8 relief in chapter 13. Therefore, the Trustee has not requested
9 dismissal.

10 Even so, there are facts present that raise substantial
11 concerns on the part of the court as to whether Bennett's proposed
12 plan in its present form can be confirmed. For example, the plan
13 provides for nothing to be paid toward the \$93,045 in unsecured
14 debts that Bennett scheduled (which amount does not include any
15 unsecured claims resulting from any proposed lien strips). Yet, the
16 plan provides for Bennett to pay some \$2,706 per month for current

17
18 ⁷The case now before the court is distinguishable from In re
19 Nelson, 343 B.R. 671 (9th Cir. BAP 2006). In Nelson, the
20 "triggering event" of the dismissal at issue, unlike the
21 dismissal here, was limited to the bankruptcy court's denial of
22 confirmation. The BAP vacated the dismissal because the
23 bankruptcy court did not afford the debtor the opportunity to
24 amend the plan. Id. at 676. Moreover, apart from such denial of
25 confirmation, the bankruptcy court in Nelson made no findings of
26 fact to support its conclusion that the debtor filed the case in
bad faith, and had failed to assess the totality of the
circumstances. Id. at 677. This court does not read Nelson as
prohibiting dismissal when the totality of the circumstances, as
here, show that the debtor filed a chapter 13 bankruptcy case in
bad faith.

1 payments, plus an additional \$37,900 for arrears, on the loan
2 secured by the "children's residence," which, as mentioned above, is
3 overencumbered and produces no income.

4 Moreover, it is unclear to the court what the debtor's
5 justification is for making payments on at least one motor vehicle
6 when she has interests in three other motor vehicles that she
7 proposes to retain under the plan.

8 Therefore, the court will overrule the Trustee's objection to
9 confirmation of Bennett's proposed plan, but declines to confirm the
10 plan in its present form.

11 G. Conclusion

12 For the foregoing reasons, the court will issue its orders:
13 (a) dismissing Tran's chapter 13 case, and (b) overruling the
14 Trustee's objection to Bennett's proposed plan grounded on the lien
15 stripping issue, but denying confirmation of the proposed plan in
16 its present form.

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18 *END OF ORDER*
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COURT SERVICE LIST

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Decision

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