UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

In Re: **LINDA HIGGS,**	**Chapter 13 Proceedings**
	Case No. BK-03-04589 CGC
Debtor.	**UNDER ADVISEMENT DECISION RE: COLONY SOUTH HOMEOWNERS ASSOCIATION'S OBJECTION TO FIRST AMENDED PLAN**

I. Introduction

Before this Court is Colony South Homeowners Association's ("Colony") Objection to Debtors' First Amended Chapter 13 Plan. Colony objects to its treatment under the Plan as an unsecured creditor. The Court sustains Creditor's Objection for the reasons set forth below.

II. Facts

The facts are undisputed. Debtor owes Colony various assessments and related charges and interest pursuant to Article IV of the Declaration of Covenants, Conditions and Restrictions ("Declaration") as record owner of certain real property within the homeowner's association. Under the Declaration and state law (Arizona Revised Statute section 33-1807), Colony is secured by a consensual lien on the real property in question. Colony also has a judgment against Debtor for the amounts owing. The only question to be decided here is whether Colony's claim is secured or unsecured under Debtor's First Amended Plan.

This is Debtor's second bankruptcy case. Debtor filed her first Chapter 13 case in 1998. In that case, Colony filed a proof of claim listing itself as a secured creditor. The case was ultimately dismissed after the estate was fully administered.

Debtor filed this present bankruptcy in March, 2003. Colony did not file a proof of claim in this case. However, Debtor listed Colony as a secured creditor in her Schedule D, and that Schedule was never amended. Further, in Debtor's initial Chapter 13 Plan in this case, Debtor classified Colony's claim as secured in the amount of $6,843.00. Subsequently, Debtor filed a First Amended Plan, in which she changed her treatment of Colony's claim, providing that "[a]ll other claims shall be classified as unsecured, including the Colony Smith [sic] Homeowners'

Association which failed to produce any proof of secured claim to Debtor's original Plan. On September 2, 2003, a copy of Debtor's First Amended Chapter 13 Plan was mailed to Colony along with a Notice of Date to File Objections.[1] Colony never filed an objection to the First Amended Plan.

Subsequently, Debtor sold the real property with the approval of the Chapter 13 Trustee. Lawyer's Title of Arizona is currently holding the sum of approximately $9,100.00 from the sale. This is the amount being claimed by Colony pursuant to its claimed lien on the property. Debtor seeks release of the funds and a determination by this Court that Colony is unsecured, as provided under the Plan, and that the purchasers of the property should take the property free and clear of any claimed lien by Colony. The Court does not agree.

III. Analysis

The issue is whether Debtor's treatment of Colony's claim as unsecured in the amended plan, coupled with Colony's failure to file a proof of claim in the case or an objection to the amended plan, means Colony is in fact unsecured now despite its consensual and statutory lien. Debtor maintains that Colony is bound by the terms of the First Amended Plan under 11 U.S.C. section 1327(a), which states, "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Debtor basis this assertion on case law in which the creditor is seeking relief from section 362's automatic stay. *See In re Evans*, 30 B.R. 530 (9th Cir. 1983) (holding § 1327 bars secured creditor from seeking relief from stay absent a post-confirmation default in carrying out plan).

However, a more exhaustive look at the pertinent case law indicates that section 1327 does not apply to liens. The general rule in bankruptcy is that liens pass through the bankruptcy unaffected. *See Dewsnup v. Timm,* 502 U.S. 410, 418, 116 L.Ed.2d 903, 112 S.Ct. 773 (1992).

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[1]Notice was not mailed to Colony's counsel of record in the prior bankruptcy case, Beth Mulcahey or Pullen Law Group.

Normally, to extinguish or modify a lien during a bankruptcy proceeding, some affirmative step must be taken to do so:

> Because confirmation of a Chapter 13 plan is res judicata only as to issues that can be raised in the less formal procedure for contested matters, . . . confirmation generally cannot have preclusive effect as to the validity of a lien, which must be resolved in an adversary proceeding. In other words, 'if an issue must be raised through an adversary proceeding it is not part of the confirmation process and, unless it is actually litigated, confirmation will not have preclusive effect. . . . [A] secured creditor is not bound by the terms of the confirmed plan with respect to limitations upon the scope or validity of the lien securing its claim.' *See In re Beard,* 112 Bankr. 951, 956 (Bankr. N.D. Ind. 1990). . . . Initiation of an adversary proceeding is a prerequisite to challenging 'the validity or existence' of a lien against property of the estate in a Chapter 13 proceeding . . . . Where such a proceeding is required to resolve the disputed rights of third parties, the potential defendant has the right to expect that the proper procedures will be followed.' *Id.* at 955 (citing *In re Commercial Western Finance Corp.*, 761 F.2d 1329, 1336-38 (9th Cir. 1985)).

*Cen-Pen Corp. v. Hanson,*58 F.3d 89 (4th Cir. 1995).

A lien remains valid even if a secured creditor does not file a proof of claim, even if a debtor does not provide for the secured claim in a confirmed Chapter 13 plan, and even if the creditor does not object to the plan. *Id.; see also In re Bisch*, 159 B.R. 546 (9th Cir. BAP 1993) (holding IRS's failure to list tax liability as secured in its proof of claim and debtors' failure to treat IRS's lien in their Chapter 13 plan does not affect validity of federal tax lien); *In re Tarnow*, 749 F.2d 464, 465 (7th Cir. 1984) (stating that the failure of a secured creditor to file a proof of claim is not a basis for avoiding the lien of the secured creditor); *In re Beard*, 112 B.R. 951, 954 (Bankr. N.D. Ind. 1990) (asserting "even where confirmed without objection, a plan will not eliminate a lien simply by failing or refusing to acknowledge it or by calling the creditor unsecured"); *In re Simmons*, 765 F.2d 547, 555 (5th Cir. 1985) (holding confirmation of debtor's Chapter 13 plan did not have the effect of lifting creditor's statutory lien because "there appears to be no sound reason for lifting liens by operation of law at confirmation under chapter 13.").

Because Colony is the holder of a consensual and statutory lien against Debtor's real property, its lien passes through Debtor's bankruptcy unaffected. The case law provides that Colony's lien survives the First Amended Plan even though it never filed a proof of claim or

objected to the plan. Further, Debtor's argument that Colony's failure to file a proof of claim indicated that it had an unsecured claim rings hollow: Colony had filed a secured claim in Debtor's earlier bankruptcy case for the same type of debt at issue here, and Debtor herself listed Colony as secured in her Schedules and her original plan in this case. In addition, while not a determinative factor here, the First Amended Plan mistakenly referred to Colony as "Colony Smith" and not as "Colony South," possibly creating some confusion and raising some due process concerns.

IV. Conclusion

For the foregoing reasons, the Court sustains Colony's objection to its treatment as an unsecured creditor under Debtor's First Amended Plan.

So ordered.

DATED: Oct. 4, 2005

CHARLES G. CASE II
United States Bankruptcy Judge

COPY of the foregoing mailed and/or via facsimile this 6th day of October, 2005 to:

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