IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
LARRY & WENDY POPPE,	)	CASE NO. BK01-41724
	)	
Debtor(s).	)	CH. 7

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on May 5, 2004, on the debtors' motion to reopen the case (Fil. #12) and resistance by First National Bank of Belden (Fil. #18), and on the debtors' motion to void lien (Fil. #14) and the First National Bank of Belden's motion to strike (Fil. #17). Richard Johnson appeared for the debtors, and Steven J. Woolley appeared for First National Bank of Belden. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(K).

The motions will be denied.

This is a no-asset Chapter 7 case in which the debtors were granted a discharge in October 2001. Prior to the petition date, the First National Bank of Belden transcribed a default judgment of $15,000 from the County Court of Cedar County to the District Court of Lancaster County, resulting in a lien. The debtors had little equity in property at the time to which the lien could attach, and they were not aware of the lien until recently. The bank was listed in the bankruptcy schedules as an unsecured creditor. The debtors now seek to reopen the bankruptcy case and have the lien declared void under 11 U.S.C. § 506(d).

The debtors want to strip down the bank’s lien to the value of their interest in the real property on the petition date. At that time, they owned an unimproved residential lot valued at $33,000, with a first lien of $28,000 against it. Post-discharge, the debtors built a house on the lot and currently reside there.

The Code section commonly used to avoid liens is § 522(f), but that applies only when the lien impairs an exemption. There has been no such claim here.

The Bankruptcy Code permits the reopening of a closed case "to administer assets, to accord relief to the debtor, or for other cause." § 350(b).

The reopening of a case is merely a ministerial or mechanical act which allows the court file to be retrieved from the stacks of closed cases to enable the court to receive a new request for relief; the reopening, by itself, has no independent legal significance and determines nothing with respect to the merits of the case. In re Germaine, 152 B.R. 619, 624 (B.A.P. 9th Cir. 1993) (citing In re David, 106 B.R. 126, 128-29 (Bankr. E.D. Mich. 1989) and In re Daniels, 34 B.R. 782 (B.A.P. 9th Cir. 1983)).

In this case, there appears to be little to be gained from reopening the case. Chapter 7 debtors generally are not able to strip down undersecured non-consensual liens on real property. In Dewsnup v. Timm, 502 U.S. 410 (1992), the Supreme Court ruled that § 506(d) does not authorize a debtor in a Chapter 7 case to strip down consensual liens when the creditor's claim is secured by a lien and has been fully allowed. Like the debtor in Dewsnup, the Poppes contend that because claims are considered secured under § 506(a) only to the extent of the value of the real estate to which the lien is affixed, the creditor's claim is automatically an "allowed secured claim" to that extent and the amount of the lien exceeding that can be voided. However, the Supreme Court adopted an alternative interpretation, holding that for purposes of § 506(d), the phrase "allowed secured claim" should be read term-by-term to mean any claim that is, first, allowed, and second, secured.

Here, the bank's claim has not been "allowed" because this is a no-asset case and no claims were filed. "[U]nless and until there is a claims allowance process, there is no predicate for voiding a lien under § 506(d)." Laskin v. First Nat'l Bank of Keystone (In re Laskin), 222 B.R. 872, 876 (B.A.P. 9th Cir. 1998).

> In contrast to Chapter 13, where claims must be allowed or disallowed to determine what gets paid through the plan, and the would-be secured creditor whose claim is allowed only as unsecured gets paid as an unsecured creditor, the allowance of a secured claim, or determination of secured status is meaningless in a Chapter 7 where the trustee is not disposing of the putative collateral.

Laskin, 222 B.R. at 876.

In another case, the South Carolina bankruptcy court explained:

> This Court agrees with the Eighth and Ninth Circuits and many other jurisdictions that the Dewsnup decision stands for the proposition that § 506(d) alone does not operate to void a lien but that it must be used in connection with another statute such as § 722, § 1129, § 1225, or § 1325. Without more from Congress, a Chapter 7 debtor does not have standing to use § 506(d) to void a lien on real property which is abandoned or likely to be abandoned and therefore of no benefit to the estate.

In re Virello, 236 B.R. 199, 204 (Bankr. D.S.C. 1999).

Courts have ruled that although the facts of Dewsnup dealt with a consensual lien, "the Supreme Court's examination of the history of liens under the Bankruptcy Code and its conclusion based on that examination is not so limited" and is equally applicable to non-consensual liens. Swiatek v. Pagliaro (In re Swiatek), 231 B.R. 26, 29-30 (Bankr. D. Del. 1999). See also Esler v. Orix Credit Alliance (In re Esler), 165 B.R. 583, 584 (Bankr. D. Md. 1994); In re Doviak, 161 B.R. 379, 380-81 (Bankr. E.D. Tex. 1993).

The Eighth Circuit has addressed the Dewsnup decision in the context of whether § 506(d) allows lien-stripping in Chapter 12 cases. It noted:

> Dewsnup does not hold that § 506(d) *prohibits* lien-stripping in Chapter 7 – it holds only that § 506(d) does not itself provide the authority for a debtor to strip down liens. See Dewsnup, 502 U.S. at 417, 112 S. Ct. at 778. The lien in Dewsnup remained on the property not because § 506(d) mandated that result, but because neither § 506(d) nor any other provision of the Code applicable in Chapter 7 gave the debtor the power to strip down the lien. The question in this case, therefore, is whether any provision applicable in Chapter 12 provides that power. . . .

Harmon v. Farmers Home Admin., 101 F.3d 574, 581 (8th Cir. 1996) (emphasis in original).

The Eighth Circuit concluded that § 1225(a)(5)(B) in conjunction with § 506(a) does permit liens to be stripped down. Harmon has been interpreted as evidencing the appellate court's unwillingness to read Dewsnup to permit a Chapter 7 debtor to use § 506(d) to strip off a completely unsecured junior lien. In re Fitzmaurice, 248 B.R. 356 (Bankr. W.D. Mo. 2000). The Fitzmaurice court also found Laskin, Virello, Swiatek, and similar cases to be persuasive, and held that a Chapter 7 debtor cannot use § 506(d) to avoid a totally unsecured lien. Here, the bank's lien would have been partially secured on the petition date, but that fact does not significantly alter the analysis as to the applicability of Dewsnup and the debtors' inability to use § 506(d) to strip down the lien.

Dewsnup also notes that a bankruptcy discharge extinguishes only the debtor's personal obligation on a claim while leaving intact the option of enforcing a claim through an *in rem* action. 502 U.S. at 418. See also Stephens v. Jensen-Carter (In re Stephens), 276 B.R. 610, 613-14 (B.A.P. 8th Cir. 2002) (discharge injunction of § 524(a)(2) applies to *in personam* actions, but does not prohibit *in rem* actions against property). This is an additional reason for not voiding the bank's lien.

A separate order will be entered denying all of the motions.

DATED: June 8, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*Richard Johnson
*Steve Woolley
Joseph H. Badami
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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ORDER

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IT IS ORDERED: For the reasons stated in the Memorandum of today's date, the debtors' motion to reopen the case (Fil. #12) is denied, the debtors' motion to void lien (Fil. #14) is denied, and the First National Bank of Belden's motion to strike (Fil. #17) is denied.

DATED: June 8, 2004.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

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