SO ORDERED.

SIGNED this 15 day of March, 2006.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
MITCHELL LEE FOSTER and	)	
KATHERINE LOUISE FOSTER	)	**Case No. 00-42068**
	)	**Chapter 13**
Debtors.	)	
	)	
MITCHELL LEE FOSTER and	)	
KATHERINE LOUISE FOSTER	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Adversary No. 05-7020**
	)	
ONYX INVESTMENT, L.L.C.	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiffs' and Defendants' respective Motions for

Summary Judgment.[1] The Court has reviewed all pleadings in support of each motion, and is now prepared to rule. This matter constitutes a core proceeding, and the Court has jurisdiction to decide it.[2]

I. FINDINGS OF FACT

In November and December 1994, Plaintiffs, Mitchell and Katherine Foster (the "Fosters" or "Debtors"), purchased land in Jefferson County, Kansas by entering into a contract for deed transaction with Vernon Robb and Deloris D. Myers-Robb (the "Robbs"). In February 1995, the Fosters executed a $82,500 first mortgage on their home to Bank United of Texas, FSB, the predecessor-in-interest to Washington Mutual Bank. This mortgage was recorded with the appropriate register of deeds and constituted a valid, perfected first mortgage.

In December 1997, the Fosters executed a $20,000 mortgage on their home to Rosslare Funding, Inc. This mortgage was also properly perfected. Approximately one week after the Fosters executed the mortgage to Rosslare, it assigned that mortgage to Empire Funding Corporation ("Empire"). On May 15, 2000, Empire filed a petition under Chapter 11 of the United States Bankruptcy Code in the Western District of Texas. Debtors never received notice of the filing of that bankruptcy proceeding, and Onyx never suggests notice was sent to Debtors. Defendant, Onyx Investment, L.L.C. ("Onyx"), then acquired this second mortgage from Empire in June 2001.

The Fosters filed their Chapter 13 bankruptcy petition on September 19, 2000. Empire was not listed in Schedule D (secured creditors), but instead was listed on Schedule F (unsecured creditors). The Fosters scheduled secured debt from Bank United and the Robbs (on a contract for

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[1]Doc. 54 for Fosters, Doc. 57 for Onyx Investment. All references to docket numbers are to the main case, 00-42068, unless otherwise noted.

[2]28 U.S.C. §§ 157(b) and 1334.

deed) of $116,950, and indicated the real property value was $106,000. On the date of filing, Debtors also filed a Chapter 13 plan that stated "Empire Funding Corp. has an unsecured second mortgage on debtors' home. The Fosters believe this lien can be avoided under § 506(a) and § 1322(b)."[3]

The Court file reflects that the Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, and Deadlines,[4] as well as a copy of the original Chapter 13 Plan, were mailed on September 21, 2000 to each creditor listed on the matrix provided by Debtors. When mail is properly addressed, stamped and deposited in the mail system, there is a presumption it was received by the party to whom it was sent.[5] The Notice provided that the deadline to file an objection to confirmation was fifteen days prior to November 22, 2000, the confirmation date.

The mailing was physically accomplished by the Bankruptcy Noticing Center ("BNC") pursuant to D. Kan. LBR.2002.1, which Rule provided that notices normally served by the Clerk are physically mailed by the BNC. The BNC has contracted with the Administrative Office of the United States Courts to produce and mail notices in bankruptcy cases. Empire Funding Corp was one of the creditors listed on the provided matrix, and is listed in the BNC notice as one of the creditors to whom these documents were mailed.

The Clerk of the Court, at that time (pre-electronic filing), actually retained each piece of returned mail in its file, in the actual envelope in which it was originally mailed. This Judge has

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[3]Doc. 19. Emphasis in original.

[4]Doc. 4.

[5]*In re Schicke*, 290 B.R. 792, 801 n.20 (10th Cir. BAP 2003) (holding papers sent by United States mail are presumed received by the addressee, absent evidence to the contrary). Onyx has done nothing to rebut that presumption here.

now personally inspected this entire file. None of these initial 341 notices were returned to the Court by the Postmaster. The BNC also simultaneously mailed to each creditor a Form B10 Proof of Claim.[6] The form was incomplete except that the following information was automatically filled in by the BNC on the form sent to each creditor: the names of both debtors, the case number, the name of the pertinent Chapter 13 Trustee, Jan Hamilton, the creditor's name and address as provided on the creditor matrix, a creditor identification number specific to each creditor in the case, and a bar code containing that creditor-specific number.

Onyx questions whether its predecessor, Empire, received notice of the initial bankruptcy pleadings, or of the amended plan[7], but there are three pieces of evidence before the Court that result in there being no genuine issue of fact that at least the initial filings were received. First, a review of the Court file reflects that the notices (of the original petition, plan, and Form B-10 Proof of Claim Form) mailed to Empire were never returned to the Clerk. Second, Onyx attached a report from the Credit Bureau of Topeka, as Exhibit X to its memorandum in support herein.[8] That report clearly reflects that on October 10, 2000, just 21 days after Debtors filed their bankruptcy petition, Empire made an inquiry to the Credit Bureau regarding the Fosters. The Court assumes (but does

[6]*Id*. at page 2.

[7]Onyx failed to comply with D. Kan. LBR 7056.1(b) in that its opening memorandum in opposition to Debtors' summary judgment motion fails to begin with (or anywhere therein) "a section that contains a concise statement of material facts about which the party contends a genuine issue exists." Its replies infer that it doesn't really dispute any of the facts 1-21, and the Court's rules deem those facts admitted "unless specifically controverted by the statement of the opposing party." Certainly Onyx did not submit any evidence, on their own, such as an affidavit, to rebut the "mailbox" rule that mailings mailed, and not returned, were received by Empire.

[8]Doc. 58 to Adversary Proceeding (at page 10 of the composite set of exhibits).

not rely on the fact, as dispositive) that the requested credit report would have disclosed the Fosters' bankruptcy.[9]

Third, and most compelling, when Onyx ultimately filed its Proof of Claim in this bankruptcy, it used the very form that had been sent to Empire on September 21, 2000 by the BNC. There is no doubt it is the same form because a comparison of the copy of the BNC-generated B-10 with Proof of Claim No. 14 filed by Onyx on July 20, 2001 shows the same type face and font for the Debtors' names, for the Case Number 00-42068, and for the Trustee, Jan Hamilton, in the upper right hand of the form.[10] When BNC generates these Proof of Claim forms and mails them to the respective creditors, they insert the creditors's name (as it appears on the matrix) in the block requesting Name of Creditor—here Empire Funding Corp was inserted by BNC—as well as the name and address as it is contained on the matrix in the block after the words "Name and Address where notices should be sent." Here, "Empire Funding Corp" was again inserted, with the Austin, Texas address contained in the matrix. It contained the same spelling—with no period after the word "Corp"–just exactly as Debtors' matrix had typed it.

Finally, a comparison of this Proof of Claim form with those filed by several other creditors who also chose to use the BNC-provided form, further demonstrates this is the BNC-generated form, as each of their forms also include the specifically designated BNC Creditor ID number, with the corresponding bar code at the bottom right of the claim actually filed.[11] When Onyx completed the rest of this form, it lined through Empire's name and address, and hand-wrote in its own. There can

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[9]One also has to question why Empire would have made that inquiry at that juncture, if they didn't know of the filing of the bankruptcy.

[10]Doc. 4, page 2.

[11]*Compare* Claims No. 1, 3, and 14.

be no dispute that Empire received this Proof of Claim form from the BNC when the case was initially filed, and later provided that form to Onyx. As a result, there can also be no doubt that it received notice of this bankruptcy, and the deadlines for filing claims and objections to confirmation, since the Proof of Claim form was sent with those notices in the same mailing by the BNC.

Prior to confirmation, on January 31, 2001, Debtors filed an amended plan, which further clarified the proposed treatment of Empire's mortgage. Debtors' counsel sent a copy of that amended plan to all creditors.[12] This plan even more expressly provided its intent to strip Empire's mortgage by providing: "The claim of Empire Funding Corp. for a second mortgage is totally unsecured. **The second mortgage on the homestead shall be stripped off and voided due to the fact that it is unsecured. The claim shall be allowed as a general unsecured claim without priority.**" The underlining and bold print were part of the plan that was sent to creditors; this was the only language contained within the text of the plan that was emphasized.

The amended plan was confirmed April 18, 2001, without objection. Admittedly, at no time did Debtors seek relief from stay in the Empire bankruptcy proceeding. Three months after the plan was confirmed, Onyx did a credit check on Debtors, which confirmed what its assignor, Empire, already knew---that the Fosters had filed this bankruptcy. On July 20, 2001, and well within the 180

[12]Doc. 19, Certificate of Service at p.2.

days allowed by 11 U.S.C. § 1330(a)[13] to seek revocation of an order of confirmation procured by fraud, Onyx filed a proof of claim using Empire's form.[14]

On August 21, 2001, the bankruptcy trustee objected to Onyx's proof of claim because it was filed after the January 24, 2001 bar date.[15] Onyx filed no response, and failed to assert any defense of lack of notice of the filing of the case. On October 12, 2001, still within the six months allowed by § 1330(a) to set aside a confirmation received by fraud, an order was entered granting the Chapter 13 Trustee's objection to the Defendant's proof of claim.[16] Onyx did not seek reconsideration or appeal the order sustaining the trustee's objection. Debtors then successfully completed their Chapter 13 plan—after making $17,626 in payments over three years,[17] and were granted a discharge on December 24, 2003. Onyx received a copy of that discharge notice.[18]

Ten months after discharge, on October 27, 2004, Onyx filed a Petition for Foreclosure in the District Court of Jefferson County, Kansas. That foreclosure seeks *in rem* relief only, an implicit acknowledgment that Onyx was well aware of the Fosters' discharge, but makes no mention of their bankruptcy. During the pendency of that foreclosure action, the Fosters sold a portion of the property secured by Empire's mortgage on December 23, 2004, and a portion of the proceeds from

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[13]This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references are thus to 11 U.S.C.A. §§ 101 - 1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are likewise to Fed. R. Bankr. P. (2004), unless otherwise specified.

[14]Claim No. 14.

[15]Doc. 40. Even if the claim had been timely, the Trustee or Debtor would have had to object to it because it was filed as a secured claim, and the confirmed plan specifically provided not to pay the claim as secured.

[16]Doc. 46.

[17]*See* Trustee's Final Report, Doc. 58.

[18]Doc. 64.

that sale are being held by Capital Title Insurance Company, LLC ("Capital Title") pending resolution of this dispute with Onyx. To resolve this dispute, the Fosters reopened their bankruptcy case and filed this adversary proceeding on March 15, 2005, seeking to enjoin Onyx from attempting to enforce its lien against their property on the basis that its lien was stripped upon discharge, and the underlying debt discharged.

Finally, Onyx outlines a series of facts they believe would show that Debtors, their then counsel, and later, a title company, all conspired to defraud the Court and/or, ultimately, Empire and/or Onyx. All of the acts that Onyx suggests demonstrate that Debtors had knowledge of the falsity of statements contained within their bankruptcy petition and schedules obviously occurred pre-September 2000. Accordingly, these acts could have been, and should have been, with due diligence, known to Onyx in time to protect its rights under either § 1330(a) or § 1328(e), as will be further discussed, below.

Additional facts will be discussed below, when necessary.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law."[19] In applying this standard, the Court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[20] An issue is "genuine" if "there is sufficient evidence on each

[19]Fed. R. Civ. P. 56(c). Fed. R. Civ. P. 56(c) is made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7056.

[20]*Lifewise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004); *Loper v. Loper (In re Loper)*, 329 B.R. 704, 706 (10th Cir. BAP 2005).

side so that a rational trier of fact could resolve the issue either way."[21] A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim."[22]

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[23] In attempting to meet that standard, a movant who does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim.[24]

If the movant carries this initial burden, the nonmovant who would bear the burden of persuasion at trial may not simply rest upon his pleadings; the burden shifts to the nonmovant to go beyond the pleadings and "set forth specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.[25] To accomplish this, sufficient evidence pertinent to the material issue "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein."[26] Finally, the Court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[27]

III. ANALYSIS

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[21] *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[22] *Id.* (citing *Anderson*, 477 U.S. at 248).

[23] *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

[24] *Id.* (citing *Celotex*, 477 U.S. at 325).

[25] *Id.* (citing Fed. R. Civ. P. 56(e)).

[26] *Diaz v. Paul J. Kennedy Law Firm*, 289 F.3d 671, 675 (10th Cir. 2002).

[27] *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

The parties have raised several issues in their respective summary judgment motions, but the arguments can essentially be grouped into three main areas. First, Onyx contends that the Fosters were required to initiate an adversary proceeding to strip the lien in question. Second, Onyx suggests this Court should revoke the Fosters' discharge on the basis it was fraudulently received. Third, Onyx argues that Empire, Onyx's predecessor in interest, received inadequate notice of the Fosters' intent to strip its lien to render the stripping effective, given that Empire was in its own bankruptcy proceeding when the plan and amended plan were served upon it. Onyx thus argues that because its predecessor was itself a debtor in a pending bankruptcy proceeding at the time the Fosters filed their petition, their plan could not effectively strip Empire's property interest in Debtors' home without Debtors first receiving relief from stay to do so.

A. The Fosters were not required to file an adversary proceeding to strip Empire's lien.

The first issue is whether the Fosters were required to file an adversary proceeding to successfully strip Empire's mortgage lien on their home. Although this Court agrees that a creditor must receive notice sufficient to satisfy due process before its lien can be stripped,[28] and that the preferred method at least in this Court is to file a separate motion to do so,[29] this Court has already

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[28]This Court has previously issued a decision, in the student loan context, dealing with similar due process arguments to those herein raised by Onyx. *See In re Boyer*, 305 B.R. 42 (Bankr. D. Kan. Feb 03, 2004), reversed in part on other grounds, *Educational Credit Mgmt. Corp. v. Nelson (In re Nelson)*, 318 B.R. 532 (10th Cir. BAP 2004). As in this case, the creditor in *Boyer* also argued that the Tenth Circuit Court of Appeals would decline to apply the finality principles, set forth in *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253, 1257 (10th Cir. 1999), to these facts, claiming that the student loan creditor in *Andersen* had not made similar due process argument and thus the Tenth Circuit did not squarely confront the issue of due process. This Court held in *Boyer*, as it does now, that because there is no real dispute that the creditor received notice of the bankruptcy and plan, requisite due process was afforded. *See In re Boyer*, 305. B.R. at 51-53, for a full discussion of due process, including that under Kansas law, substantial compliance with requirements for service and awareness of action are what is necessary.

[29]See *Centex Home Equity Company, L.L.C. v. Woodling (In re Woodling)*, 2004 Bankr. LEXIS 1751 (Bankr. D. Kan. 2004), where this Court provided an outline of what it now requires be contained in a motion to strip a lien outside of the Adversary Proceeding process, under these kinds of facts where the allegation is there is no value for the lien that is to be stripped.

decided under similar facts that a mortgage lien can be stripped without the filing of an adversary proceeding. In *Centex Home Equity Company, L.L.C. v. Woodling (In re Woodling)*[30] this Court held that the Woodlings' failure to file an adversary proceeding under Fed. R. Bankr. P. 7001(2) was not fatal to its attempt to strip Centex's mortgage lien in light of Tenth Circuit Court of Appeals precedent regarding the finality of confirmation orders.

In so holding, this Court held that because debtors' plan expressly outlined the reason for lien stripping, and the effect of confirmation on the lien, and because it was not an action "to determine the validity, priority, or extent of a lien or other interest in property," no adversary proceeding was required (given the clear evidence that the creditor had received actual notice of the contents of that plan). The pertinent facts of this case are indistinguishable from those in *Centex* in that the creditors in each case knew of the existence of the bankruptcy and had at least constructive notice of the contents of the plan with the offending provision, in plenty of time to bring an action to set aside confirmation under 11 U.S.C. § 1330(a). Instead, both creditors elected to wait until after the respective debtors had relied for years on the binding effect of their confirmation orders before instigating an action to nevertheless foreclose on the lien that had been stripped. This Court finds that the *Centex* holding is directly applicable to this case and, despite Onyx's attempt to show that it was incorrectly decided, controls.

Although the Court need not separately address each of Onyx's arguments on this point, as the majority of its arguments were considered and rejected by the Court when deciding *Centex*, the Court will address one argument that was not raised under the fact pattern in *Centex*. Onyx contends that, as a factual matter, an adversary proceeding was required here because the lien held by the

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[30] *Id.*

Robbs was invalid, and once its $38,000 lien is removed, there is equity for Onyx's claim. If true, this would result in at least a portion of Onyx's lien being secured and not subject to stripping. Onyx argues that because this issue involves the validity of the lien held by the Robbs, Fed. R. Bankr, P. 7001(2) requires an adversary proceeding. The Court disagrees for three reasons.

First, the Fosters attempted to strip, through the plan confirmation process, what they claimed was a wholly unsecured lien. This Court has already found such action does not require an adversary proceeding so long as certain due process concerns are satisfied. The issue involving the validity of another lien (the Robbs') only became an issue when Onyx raised it as a defense in this adversary proceeding. Therefore, the Court finds that the plan was not, in essence, a proceeding to determine the validity of Empire's lien.

Second, this factual matter (whether the lien was in fact totally unsecured) was put at issue in 2000 when Debtors first filed their plan, and again in January 2001 when they amended that plan to make it even more clear what they intended to do. It would be unjust for the Court to now hold that these Debtors were required to anticipate that, four years later, someone might choose to raise the invalidity of the Robbs' lien as a defense. The Fosters were not required to initiate an otherwise unnecessary adversary proceeding just in case Empire, or some other creditor, later chose to raise a defense at some point in the future that involved the validity of a lien other than Empire's own lien.

Third, the fact of the matter is that the Tenth Circuit Court of Appeals, whose decisions are binding on this Court, has held that if an order is final, it must be given preclusive effect even if the matter was arguably wrongly decided on the law, or because a different procedure could have been

used to determine the issue. That is because it is settled, at least in this Circuit, and at least for now,[31] that an order need not correctly apply the law to be given preclusive effect.[32] For these reasons, and based upon the Court's *Centex* decision, the reasoning in which the Court incorporates herein, the Court finds that the Fosters were not required to initiate an adversary proceeding in order to strip Empire/Onyx's lien.

B. Onyx's attempt to revoke the Fosters' discharge is untimely.

Onyx next claims that the Fosters' discharge, which was entered on December 24, 2003, and of which Onyx clearly had concurrent notice, was obtained by fraud and should be revoked. Onyx outlines a series of acts by Debtors (that they claim were later furthered by their then-counsel and a title company) that it argues would have persuaded the Court that Debtors had purposely misrepresented in their bankruptcy schedules their interest and the interest of others in certain real estate. Pursuant to § 1328(e)(1), the Court may revoke a debtor's discharge if such discharge was obtained by the debtor through fraud, provided a party in interest requests revocation within one year of the discharge. This one-year period thus expired December 24, 2004.

Onyx never commenced any proceeding in this Court, or any other, seeking to revoke Debtors' discharge. Instead, even though Debtors had not made a payment to Onyx's predecessor since before September 2000, and had never made a payment to Onyx, Onyx waited from the time it acquired its interest in the note and mortgage (in June 2001) until April 5, 2005, when it filed an

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[31]This Court understands that the Tenth Circuit Court of Appeals is going to hear argument in November, 2006 in certain appeals relating to this issue in the student loan context, as a result of the language in *In re Poland*, 382 F.3d 1185, 1188 n.2, that "The panel is of the view that *Andersen* was wrongly decided and should be reconsidered."

[32]*In re Boyer*, 305 B.R. at 50 n.19 (citing *Underwriters Nat'l Assurance Co. v. N. Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 714 (1982) and *United States v. Tippett*, 975 F.2d 713, 719 (10th Cir. 1992) (holding that the "res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.") (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)).

answer and counterclaim in this Adversary Proceeding, to question the discharge. And even in that pleading, Onyx did not pray for revocation.[33] The first time Onyx ever raised revocation as an issue in this Court was on December 6, 2005 in the final Pretrial Order,[34] almost two years after Debtors' discharge (and 4 ½ years post-confirmation).

Onyx argues that because it filed its state court foreclosure proceeding in October 2004, approximately two months before the expiration of the one year period to seek revocation of discharge under § 1328(e), the Court should consider its December 2005 request to revoke Debtors' discharge as timely, under the theory that its claim to revoke the discharge should relate back to the filing of the state court foreclosure proceeding under Fed. R. Civ. P. 15(c).[35] The Court finds that Rule 15(c) is not applicable in this case.

First, Onyx fails to provide, and the Court is unable to find, any support for the theory that a pleading filed in a bankruptcy case can relate back to a filing in state court (that was never removed to federal court) for purposes of deciding whether a time limit established by the bankruptcy code has expired. Even assuming this is possible, however, which the Court seriously doubts, the Court finds that relation back is inapplicable. The foreclosure proceeding was an *in rem* proceeding that was based upon the Fosters' failure to make payments on a note, once secured by a mortgage, owned by Onyx. The foreclosure petition made no mention of the bankruptcy, whatsoever, let alone alleging fraud in obtaining confirmation or discharge.[36]

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[33]Doc. 6 in Adversary Proceeding.

[34]Doc. 49 in Adversary Proceeding, at page 5.

[35]Fed. R. Civ. P. 15(c) is made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7015. Onyx fails to indicate on which subsection of Rule 15(c) it relies.

[36]*See* Defendant's Exhibit AA attached to Doc. 58 in Adversary Proceeding.

Second, Rule 15(c)(2), which is the only subsection that could remotely be applicable, requires that the claim or defense asserted in the amended pleading must have arisen "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The "conduct, transaction, or occurrence" set forth in the foreclosure proceeding (failure to pay the note and mortgage assigned to Onyx by Empire) is completely separate and distinct from the "conduct, transaction, or occurrence" set forth in the request to revoke the Fosters' discharge. The only similarity between the two proceedings is that they involve the same parties and, at least in part, involve the same piece of land. That connection is simply insufficient to warrant relation back of the first request for revocation of discharge, made in December 2005 in this proceeding, to the date of the filing of the state court foreclosure proceeding.

Onyx's request to revoke the Fosters' discharge was made well beyond the one year time limit imposed by § 1328(c) and, therefore, is denied.[37]

C. The Fosters' failure to obtain relief from the automatic stay in Empire's bankruptcy proceeding does not prevent enforcement of their confirmed Chapter 13 plan, for equitable reasons.

The final issue before the Court involves the Fosters' failure to obtain relief from the automatic stay imposed in Empire's bankruptcy prior to serving a Chapter 13 Plan, and an Amended Chapter 13 Plan, that contained language attempting to strip Empire's lien interest in Debtors' real property. Because it is undisputed that Empire filed its bankruptcy petition prior to the date the Fosters filed their petition, Onyx claims that any notice provided to Empire concerning the stripping

[37]Onyx ignores that its true complaint is with Debtors' Chapter 13 Plan and Amended Plan, and less with the discharge of their unsecured debt. Onyx was the admitted owner of the paper, in question, within two months of the date the Amended Plan was confirmed on April 18, 2001. It thus had an additional four months, until October 18, 2001, to seek revocation of confirmation under § 1330(a). For whatever reason, it chose not to do that, either.

of the lien was ineffective, effectively voiding any relief that would otherwise be granted to the Fosters vis á vis Empire's lien, as a result of the confirmed amended plan.

The Fosters first argue that service of a plan containing stripping language on Empire while it was in its own bankruptcy did not violate the automatic stay that arose upon the filing of Empire's bankruptcy. This Court disagrees. Once a debtor files for bankruptcy protection, § 362 operates to automatically stay, among other things, any act "to exercise control over property of the estate."[38] Because Empire's lien against the Fosters' property was clearly property of Empire's bankruptcy estate,[39] the Court finds that the Fosters' attempt to strip Empire's lien was a violation of the automatic stay.[40]

The Fosters next contend that Onyx does not have standing to enforce the automatic stay in this case, because that right belongs exclusively to Empire. The Fosters further claim that because they provided adequate notice to Empire that its lien would be stripped, Empire could not now come forward and contest that stripping, and thus Onyx, as its assignee, cannot either. The Court finds that Onyx, as Empire's assignee, has standing to raise the issue whether the confirmed plan (and the Fosters' attempt to stip Empire's lien therein) is void as a violation of Empire's automatic stay. If the Fosters are allowed to argue that Onyx is bound by the notices sent to Empire, they cannot

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[38]11 U.S.C. § 362(a)(3).

[39]*See Ramirez v. Fuselier (In re Ramirez)*, 183 B.R. 583, 587 (9th Cir. BAP 1995) (holding that § 362 protects property of the estate in which the debtor has a legal, equitable or possessory interest, including liens held by the debtor on property of a third party).

[40]*See also Jardine's Prof'l Collision Repair, Inc. v. Gamble (In re Gamble)*, 232 B.R. 799 (D. Utah 1999) (noting that Congress intended to provide broad protection to debtors with the automatic stay) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 340- 42 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978); reprinted in 1978 U.S. Code Cong. & Admin. News 5787 at 5840, 6296-97), and *In re Blobaum*, 34 B.R. 962 (Bankr. W.D. Mo. 1983) (noting that the language of the automatic stay provisions are to be read broadly).

equitably argue that Onyx is barred from raising whatever defenses Empire would have had as a result of the receipt of those notices.

Although the Court finds that a violation of the automatic stay has occurred, and that Onyx has a right to raise that issue in this proceeding, the Court finds that equitable principles require the Court to hold that the notice given to Empire through the filing of the Chapter 13 plans was sufficient and effective, as it now applies to Onyx. Although ordinarily any action taken in violation of the automatic stay is void and without effect, the Tenth Circuit Court of Appeals has held in *Job v. Calder (In re Calder)*[41] that "equitable principles may, in some circumstances, be applicable to claimed violations of the stay."[42]

The debtor in *Calder* had filed for bankruptcy protection prior to the commencement of a state court proceeding against him. The Tenth Circuit declined to void the state court judgment upon Calder's request, finding that he had actively litigated the state court proceeding without informing any other party of the stay until just before the state court was about to enter final judgment.

Clearly, the actions of Empire and Onyx do not fall within the realm of bad faith exhibited by the debtor in *Calder*. That said, the Court notes that the Tenth Circuit did not limit, and, in the nearly sixteen years since the *Calder* decision was issued, has not limited, the use of equitable principles in cases involving stay violations to those that rise to the level of the bad faith exhibited by the debtor in that case. In fact, the Tenth Circuit noted that equitable considerations could be

[41]907 F.2d 953 (10th Cir. 1990).

[42]*Id.* at 956.

applied "*at least* where the creditor was without actual knowledge of the bankruptcy petition and the bankrupt's unreasonable behavior contributed to the debtor's plight."[43]

The Court finds that the facts of this case justify invocation of equitable considerations in regard to the Fosters' violation of Empire's automatic stay. First, one of the Fosters provided an affidavit that they were never notified of Empire's bankruptcy. Onyx makes no effort to controvert that fact. Onyx points out that a servicing agent, Ocwen, at some point notified the Fosters that it was the new servicer for the loan, but even that letter, sent post-Empire bankruptcy, makes no mention, whatsoever, that Empire was in bankruptcy. Thus, the Fosters' violation of Empire's stay was wholly inadvertent. Furthermore, Onyx presents no evidence suggesting that Debtors engaged in any bad faith in failing to seek relief from stay.

Second, the Fosters' bankruptcy case was filed in September 2000. The Fosters' original Chapter 13 plan, which indicated that Empire's lien may be stripped, was served on Empire on or about September 21, 2000, and the amended Chapter 13 plan, which clarified that Empire's lien was to be stripped, was served on January 31, 2001. The Fosters made their required plan payments for over three years, in reliance on the terms of the confirmed plan. The Fosters successfully completed their plan and received a discharge under § 1328 on December 24, 2003.

Unfortunately, it was not until October of 2004 that Onyx first sought to foreclose on the Fosters' property, more than four years after Debtors had last made any payment to anyone on the Empire note, more than four years after they had first indicated their intent to strip the lien, more than three years after receiving a Confirmation Order sanctioning that intent to strip, and nearly a full year after the Debtors emerged from bankruptcy believing that the lien had been stripped.

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[43] *Id.* (emphasis added).

Although there is certainly no evidence of bad faith on the part of Onyx or Empire, the evidence does show that Empire and Onyx were not diligent in protecting their interests.

There can be no dispute that Empire received actual notice of the bankruptcy, albeit in violation of the automatic stay, and passed that information along to Onyx by at least July 20, 2001, when Onyx filed its proof of claim using the form that was originally sent to Empire by the BNC. At the time Onyx filed its proof of claim, the Fosters' plan had been confirmed only three months earlier, and no discharge had been entered (nor would it be for over two more years). Notwithstanding the fact Onyx was receiving no payments from the Fosters or the trustee, Onyx elected to not raise any of the arguments they now raise—that the stripping of the lien in the confirmation process was as a result of fraudulent actions by Debtors pre-petition.

Instead, Onyx sat idly by as the Fosters completed their Chapter 13 plan (including paying over $7,000[44] to the very creditor—the Robbs—who Onyx now so vigorously claims was not a secured creditor at all) and obtained their discharge. As the Fosters argue, they might have elected to surrender the property in question, rather than paying thousands of dollars to retain it, had Empire or Onyx timely presented their claims. Onyx then waited yet another ten months before seeking to enforce its lien by filing a foreclosure proceeding, which eventually led the parties to this adversary proceeding. A review of the allegations of fraud now argued by Onyx show that most of the acts were alleged to have been committed many years before Onyx purchased this paper from Empire.

In addition, at the time it purchased the Foster paper, Onyx still had almost four months to attempt to set aside confirmation under § 1330(a). More significantly, Onyx's attention should have been firmly drawn to this case when, on August 21, 2001, the Trustee objected to its Proof of Claim.

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[44]*See* Trustee's Report of Receipt and Disbursements, Doc. 67.

A careful creditor would have at least by that date, if not before, studied the confirmed plan to determine why its then significant arrearage claim (resulting from several years of non-payment) was not provided for under the terms of the confirmed plan. Most would have sought relief from stay. Finally, by the time Onyx acquired the Foster paper, it still had two and one-half years to investigate the Fosters' actions, and to timely make the same § 1328(e) claims it tries to now make, out of time, and after Debtors relied, to their detriment, on Onyx's years of silence.

For these reasons, the Court finds that it would not be equitable at this late date to allow Onyx to void the confirmation or discharge orders in this case as a result of the Fosters' violation of the automatic stay in Empire's bankruptcy case, in light of the adequate opportunity Onyx had to timely investigate and make these claims. Had Onyx opted to challenge the Fosters' plan in 2001 when it clearly had notice of the bankruptcy and when it clearly had access to all the information necessary to lodge a complaint concerning the treatment of its lien and any stay violation, or had Onyx opted to timely attempt to revoke Debtors' discharge before December 2004, by which time the court records clearly show Onyx had received notice of the discharge an entire year earlier, this result could well have been different. Onyx simply sat on its rights too long, and it did so to the Fosters' detriment.[45]

IV. CONCLUSION

For the foregoing reasons, the Court finds that the Fosters are entitled to summary judgment. The Fosters' Chapter 13 plan clearly indicated that the mortgage to Empire, which instrument was

[45]*Cf. In re Andersen.* 179 F.3d at 1259 (holding that "[b]y the time ECMC began its collection efforts on the student loan obligation after Andersen emerged from bankruptcy, she certainly possessed a reasonable expectation that her student loans had been discharged as provided for in the plan; HEAF had previously failed to properly challenge the plan at any time, either by objection or appeal, Andersen had completed her payments under the plan, and she ultimately received an order of discharge. To permit ECMC to prevail at this late stage, subsequent to the order of discharge and several years after the plan was confirmed, would not only diminish the reliability and finality of the confirmed plan, but would surely disrupt Andersen's reasonable and settled expectations regarding her future financial planning.").

later sold to Onyx, was wholly unsecured and was to be stripped. The Fosters completed their Chapter 13 plan and obtained a discharge. The Fosters' request for a permanent injunction against the continuation of Onyx's foreclosure action, which was brought in violation of the stay, or the employment of any other process to enforce this discharged claim, is granted. The Court also orders Onyx to forthwith release any lien it has against the subject real property.

The Court denies, however, the Fosters' request for attorney fees and costs under 11 U.S.C. § 362(h). There was a violation of the automatic stay by both parties in this case, and the Court finds it would be inequitable to award attorney fees or costs to either party in light of these facts.

Onyx's request for a declaratory judgment that it has a valid and enforceable lien against Debtors' home is denied. The Court has found that Onyx's attempt to revoke the Fosters' discharge was filed out of time, and that Onyx is equitably barred from seeking protection based upon the Fosters' violation of the automatic stay in the Empire bankruptcy.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Motion for Summary Judgment of Plaintiffs, Mitchell Foster and Katherine Foster, is granted.

IT IS FURTHER ORDERED that the Motion for Summary Judgment of Defendant, Onyx Investment, L.L.C., is denied.

IT IS FURTHER ORDERED that the foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58.

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