SO ORDERED.

SIGNED this 08 day of February, 2006.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
JORGE COLON, JR. and	)	
ANTOINETTE VALENTINA ORTIZ-COLON	)	**Case No. 04-42174-13**
	)	
Debtors.	)	
	)	
JAN HAMILTON,	)	
Chapter 13 Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 05-7032**
	)	
WASHINGTON MUTUAL BANK, FA.	)	
	)	
Defendant.	)	

ORDER SETTING MATTER FOR SCHEDULING CONFERENCE

On December 5, 2005, the Court entered an order denying Washington Mutual Bank, FA ("Washington Mutual") Motion for Summary Judgment.[1] In that order, the Court noted that all legal

[1]Doc. 27.

issues had been decided, and that all material facts had been determined by the Court, but that because the Trustee has not filed his own summary judgment motion, instead only responding to Washington Mutual's, the Court would give Washington Mutual an opportunity to argue why summary judgment should not be granted to the Trustee.

Washington Mutual apparently misunderstood this limited inquiry as an invitation to seek reconsideration of most of the Court's prior rulings contained in its Memorandum and Order Denying Defendants' Motion to Dismiss[2] and its Memorandum and Order Denying Motion for Summary Judgment.[3] After reviewing Washington Mutual's response, the Court will not grant summary judgment to the Trustee, but will instead require him to present evidence surrounding one main issue. The Court will also outline why Washington Mutual's disguised Motion to Reconsider will not be granted.

Standing and Authority

In denying Defendant Washington Mutual's Motion to Dismiss, this Court held that the Trustee has standing and the authority to bring this adversary proceeding in an effort to void the mortgage held by Washington Mutual. According to the Court's Memorandum and Order Denying Defendant's Motion to Dismiss,[4]

> The Trustee's powers under § 544 are set at the time of the commencement of the case, thus Debtors' election to exempt their homestead property (which was not effective until after the filing of the case) does not affect the Trustee's powers. In addition, under the terms of the confirmation order filed in this case, the property in the bankruptcy estate does not revest in Debtors until they have completed all required payments and the case is closed, rather than at confirmation. This leaves

[2]Doc. 15.

[3]Doc. 27.

[4]Doc. 15.

> the Trustee with the authority to control estate property and bring actions such as this one to avoid a lien under § 544 for the benefit of the bankruptcy estate.

Nothing filed by Washington Mutual persuades this Court that it misunderstood the law on this issue, and therefore the Court finds no basis for setting aside that ruling. The Trustee has the power to bring this action, and thus this case will proceed.

Res Judicata effect of Confirmed Plan on Washington Mutual

Washington Mutual argues that the Trustee did not have authority to bring this action because the unsecured creditors did not stand to benefit enough from the proceeding. Its argument is that the Plan only requires Debtors to pay 48 mortgage payments, at $720 a month, to the estate if the Trustee prevails in avoiding Washington Mutual's mortgage, instead of preserving the entire amount of the unpaid mortgage for the estate. In response to that argument, the Court held that it was too late for Washington Mutual to so argue, because the confirmation of Debtors' Chapter 13 Plan was res judicata as to that issue. Washington Mutual clearly had timely notice of the plan,[5] and of the deadlines for objecting to the plan, because on September 2, 2004, some forty days prior to the deadline set to object to confirmation, this creditor filed its Proof of Claim.[6] In addition, the plan clearly and unambiguously put Washington Mutual on notice what would happen if it won, and what would happen if it lost, the litigation over the validity of its claim.

Washington Mutual appears to advance two main arguments why the Court should reconsider, and allow it to use this confirmation argument to now buttress its argument that the

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[5]Again, the plan merely set out what would happen if Washington Mutual won on the issue of perfection—which was to be separately litigated, and what would happen if Washington Mutual lost on the perfection issue. If Washington Mutual won, its mortgage would remain unaffected by the plan, and all mortgage payments received and held by the Trustee during the pendency of the litigation would be forthwith returned to it. If Washington Mutual lost, it would be treated as an unsecured creditor for all purposes in this bankruptcy.

[6]Claim No. 7.

Trustee does not have standing to bring the action. First, in an apparent attempt to excuse its failure to timely (or ever) object to confirmation of the plan, or to move for reconsideration of the order confirming the plan, or to appeal the confirmation order, or to move to set aside the plan pursuant to 11 U.S.C. § 1330(a),[7] it seems to argue that it was not afforded due process because the plan language de facto modifies its secured claim, which it insists is secured by real property that is Debtors' principal residence. Second, it argues that it is not bound by the terms of the confirmed plan because the claims objection process somehow preserved its right to later argue that the plan was not fair and equitable to unsecured creditors by only requiring Debtors to pay mortgage payments for 48 months, instead of until the note was satisfied. It is mistaken on both counts.

This Court decided a similar issue in a case with similar facts, *Centex Home Equity Co., LLC v. Woodling (In re Woodling).*[8] In that case, Debtor filed his Chapter 13 petition, which provided that Centex's lien on real property would be "stripped, no equity after payment of 1st mortgage." Centex was provided notice of the plan, the objection deadline and the date of the confirmation hearing. Centex chose not to object, even though it was clear the notice had been received because Centex filed a proof of claim well before the objection deadline and well before the plan was confirmed. The plan was confirmed, and Centex did not appeal the confirmation order. Instead, Centex waited over six months after the confirmation hearing, but within the 180-day period allowed by § 1330(a) (for revocation of confirmation order if procured by fraud), to bring an adversary proceeding seeking a declaratory judgment that its lien was improperly stripped, and to vacate the confirmation order for fraud.

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[7]All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101-1330 (2004), before its 2005 BAPCPA amendments, unless otherwise specified.

[8]No. 03-7102 (Bankr. D. Kan. October 14, 2004).

This Court held, among other things, that the mortgage lien on Debtor's principal residence could be stripped, notwithstanding the provisions of § 1322(b)(2), because its lien was totally unsecured by the value of the real property because of the amounts owed to prior lienholders. The Court also held that because the plan's provisions clearly set out the facts about Centex's unsecured status, because the plan was timely sent to, and received by, Centex prior to confirmation, and because Centex neither objected to the plan, nor appealed from its confirmation, Centex was bound by the terms of the confirmed plan.

Similarly, in this case, the Colons' plan very specifically and clearly set forth how Washington Mutual would be treated, depending on the outcome of litigation on its secured status.[9] More importantly, it set out how much the estate would receive if the Trustee prevailed, which is the very issue Washington Mutual now wishes to challenge. Similarly, Washington Mutual had actual notice of the plan's provisions, and chose to file a timely claim, but did nothing to contest the terms of the plan. Washington Mutual neither objected to confirmation, sought reconsideration after confirmation, or appealed from the confirmation order. And Washington Mutual did not, within six months of confirmation, seek revocation of the confirmation order, under § 1330.

It should also be noted, given what appears to be a due process argument by Washington Mutual, that it had even more notice than did Centex. First, even before the confirmation hearing was held, the Debtor had already filed and served an objection to Washington Mutual's Proof of Claim based on non-perfection.[10] Further, well before the confirmation order was entered,

[9]Similarly, if the Court finds that Washington Mutual failed to properly perfect its mortgage, then it will be deemed an unsecured creditor, and § 1322(b)(2) would clearly be inapplicable.

[10]Doc. 16 (Main case).

Washington Mutual's counsel entered an appearance in the main bankruptcy case[11] (admittedly a different attorney than is now representing this creditor). So it was not just Washington Mutual who received timely notice that this plan had been confirmed; its own counsel had received notice, and did nothing about it.

Washington Mutual has thus provided no basis to reconsider the finding that confirmation is res judicata to its argument that it is not fair (or it deprives the Trustee of standing) that Debtors will only have to pay 48 payments of $720 each to the estate if the Trustee prevails in this adversary proceeding. Its decision not to object in the first instance, or to seek reconsideration, or to appeal, especially given that it was represented by counsel that had entered an appearance in the main bankruptcy case at all relevant times, bars its complaint that it was not provided due process, or that the confirmation order is somehow not res judicata on the issue of its plan treatment, depending on the outcome of the perfection litigation. Washington Mutual was afforded the same due process rights as the creditor in *Andersen v. UNIPAC-NEBHELP (In re Andersen),*[12] and it "cannot simply sit on its rights and expect that the bankruptcy court or trustee will assume the duty of protecting its interests."[13]

The issue of whether Washington Mutual holds a valid, unavoidable security interest in the Debtors' homestead remains to be determined by the outcome of this adversary proceeding. This is not a case where the plan improperly deemed the mortgage improperly perfected. Washington Mutual is correct in claiming that issue had to be—and will be—determined by an adversary

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[11]Doc. 18 (Main case).

[12]179 F.3d 1253 (10th Cir. 1999).

[13]*Id*. at 1257.

proceeding pursuant to Fed. R. Bankr. P. 7001(2). But since the confirmed plan clearly provides how Washington Mutual's claim will be treated depending on which party prevails on the perfection issue, the confirmation of that plan does bar Washington Mutual from now raising an objection to how the plan treats its claim in the event the Trustee is successful in this adversary proceeding.

As to Washington Mutual's argument that the claims objection process somehow preserves its right to object to the plan, it is noted that the claims objection process was started prior to confirmation, and nothing in this creditor's response to the claims objection preserves any kind of objection to confirmation. Accordingly, Washington Mutual's argument that the claims objection process somehow preserved its right to object to the plan provision providing how much Debtors would pay into the estate if the Trustee/Debtor prevailed on the claims objection, is also not persuasive.

Issue of Fact regarding how mortgage indexed in Register of Deeds

The Court finds that an issue remains as to whether the mortgage recorded by Washington Mutual was sufficient to provide constructive notice to future purchasers. In denying Washington Mutual's summary judgment motion, the Court relied extensively, although not exclusively, on *Hollinger v. Imperial Warehouse Co*.[14] The Court found that the facts of this case were similar to those in *Hollinger*, where a deed was recorded for a piece of property that incorrectly identified a portion of the legal description.[15] The Kansas Supreme Court found in *Hollinger* that a document can only put a person on constructive notice of a mortgage against a piece of property if that document would show up in the chain of title during a reasonable title search. In that case, the Court

[14]122 Kan. 709 (1927).

[15]In *Hollinger*, the mortgage in question identified the wrong subdivision but contained the right lot number, whereas in this case the mortgage identified the correct subdivision, but contained the wrong lot number.

found that constructive notice would not have been given to subsequent purchasers because the deed was indexed using the wrong subdivision.

In this case, the Trustee put forth as an uncontroverted statement of fact that the mortgage was recorded under the wrong lot number. Although this statement of fact was not supported by a citation to the record, the Court nevertheless found it to be uncontroverted because Washington Mutual did not contest the statement in its response, as it was required to do pursuant to D. Kan. LBR 7056.1(b). Based on this statement of fact, the Court believed that it had all of the facts necessary to make the determination, as a matter of law, that the Trustee qualified as a bona fide purchaser of the property. Washington Mutual's recent brief indicates, however, that it did not intend to concede the manner in which this mortgage was recorded by the Shawnee County Register of Deeds, and that it would be unfair to grant summary judgment to the Trustee, who has the burden to prove that the mortgage, as recorded, did not provide constructive notice of the existence of that document.

Based on Washington Mutual's brief, the Court finds that there does exist a question of fact that prevents entry of judgment at this time. Specifically, the Trustee must prove that the mortgage filed by Washington Mutual would not show up in the chain of title during a reasonable title search in the Office of the Register of Deeds, and thus that the mortgage, as recorded, was insufficient to provide constructive notice, in light of all controlling Kansas law, including *Hollinger*.

Further Scheduling

Early in this case, the parties persuaded this Court that it was most efficient to suspend normal case processing until the Court could decide the potential jurisdictional issue Washington

Mutual wished to raise. Accordingly, on April 19, 2005, the Court entered a Scheduling Order[16] essentially staying discovery on this adversary proceeding, and the related proceedings (Washington Mutual's Motion for Relief from Stay[17] and Debtor's Objection to Washington Mutual's Claim[18]) until Washington Mutual could file, the parties could fully brief, and this Court could decide a motion to dismiss on those jurisdictional issues. The Scheduling Order noted that if the Court denied the Motion to Dismiss, it would "set another Scheduling Conference so that if any discovery needs to be completed, it can be."[19]

Washington Mutual filed its Motion to Dismiss, but added a fact section; the Trustee then treated the motion as if was also seeking summary judgment. The Court ruled on the motion to dismiss, but because of the odd procedural posture, allowed additional briefing on what the parties were now treating as a summary judgment motion.[20] As a result, this case has never been re-set to a Scheduling Conference, as promised. Therefore, the Court will now continue all issues to a Scheduling Conference to be held on **March 8, 2006 at 2:20 p.m.** Prior to that conference, the parties will be required to converse to decide what, if any, discovery remains to be done, what timetable is appropriate, when a final pretrial conference should be scheduled, whether and when additional summary judgment motions on the only remaining issue of fact should be filed, and approximately when (and for what amount of time) an evidentiary hearing should be set to allow the parties to present evidence on the remaining factual issue.

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[16]Doc. 5.

[17]Doc. 39, Main Case.

[18]Doc. 16, Main Case.

[19]Doc. 5, at 2.

[20]Doc. 16.

IT IS, THEREFORE, BY THIS COURT ORDERED that this case shall be set for a Scheduling Conference on **March 8, 2006 at 2:20 p.m.** The Clerk is directed to send the normal notice for that conference, as it contains information on completing the Report of the Parties' Planning Meeting. The Notice shall go not only to counsel in this Adversary Proceeding, but also to Debtor's counsel, because of the fact his objection to Washington Mutual's claim is being simultaneously tracked with this Adversary Proceeding.

IT IS FURTHER ORDERED that to the extent Washington Mutual's recent "Memorandum Addressing Court's Inquiry About Additional Findings" sought reconsideration of certain holdings previously made, that "motion" is denied as set forth above.

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