UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

BARBARA J. DENSLOW — CASE NO. 00-64503

Debtor — Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed on August 21, 2003, by Barbara Denslow ("Debtor"), pursuant to § 506 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), seeking to reclassify the claim of Richard Spatari, Esq. ("Spatari"), filed on behalf of Associates Financial Services Company of New York, Inc. ("Associates").[1] Opposition to the

[1] Spatari is listed as a "creditor" for notice purposes with a claim of "0." Debtor's schedules indicate that Spatari represents Associates. Both Spatari and Associates are listed on the Debtor's mailing matrix, as well.

Debtor's motion was filed on behalf of Associates on September 17, 2003.[2]

The motion was heard at the Court's regular motion term in Syracuse, New York, on September 23, 2003. The motion was adjourned to October 21, 2003 to allow the parties an opportunity to submit memoranda of law. The matter was taken under submission on October 21, 2003, following oral argument.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(1) and (b)(2)(A), (B), (K) and (O).

FACTS

Debtor filed a voluntary petition ("Petition") pursuant to chapter 13 of the Code on September 12, 2000. In the Petition, Associates is listed as an unsecured creditor with a claim of $6,541 based on a security agreement for a 1996 Dodge Intrepid that was allegedly repossessed by Associates in March 2000 from Debtor's ex-husband. Debtor's Petition acknowledges that there was a judgment/income execution on Debtor's wages in favor of Associates for the deficiency balance which arose following the sale of the vehicle by Associates. *See* Statement of Financial Affairs at ¶ 4, attached to Debtor's Petition, and Exhibit C, attached

[2] According to Spatari's Affirmation dated September 16, 2003, in connection with the Debtor's motion, he represents Citifinancial Corp., successor in interest to Associates. Because all documentation relative to the motion herein makes reference to "Associates," for consistency sake, the Court deems it appropriate to refer to "Associates" in its discussion.

to Affirmation of Spatari, filed September 17, 2003.

The Debtor's plan provides for payments of $185 per month over 36 months, for a total of $6,660. The only secured claim identified in the plan is that of Chrysler Financial Corporation, which was to be paid in full on its secured claim of $2,525 at 8% interest. KeyBank of New York, which has a security interest in the Debtor's mobile home, and Michael Tanner, who allegedly holds a land contract on Debtor's real property, were not referred to as secured creditors but were to be paid outside the plan. Unsecured creditors were to receive a dividend of no less than 10%.

The plan also includes a provision that the Oswego County Sheriff, Richard Spatari, Esq. and Associates Financial Services "are noticed to stop income execution deductions and return any funds taken from the Debtor after the commencement of this petition." The Petition and plan were signed by the Debtor on September 11, 2000 and filed on September 12, 2000 as judicated.

On December 28, 2000, a proof of claim was filed on behalf of Associates. Although the proof of claim identifies the "creditor" as Richard J. Spatari, in the box entitled "Account or other number by which creditor identifies debtor," there is an entry indicating "00-1191 Associates." Associates is identified in the attachments, which include a copy of the judgment obtained by Associates in New York State Supreme Court, County of Oswego ("State Court") on July 31, 2000, as well as a copy of a Note and Security Agreement, dated July 8, 1998, executed by the Debtor and her former husband. The proof of claim indicates that it is secured by a motor vehicle with a value of $7,626. It goes on to indicate that the amount of the claim is $6,282.86 and refers to a judgment in the amount of $5,669.86, entered August 2, 2000.

Both Associates and Spatari appeared on the Debtor's mailing matrix. On the Debtor's schedules, Spatari was listed as a "creditor" for notice purposes and there was a notation that he

represented Associates and actually held a claim of "0".

The confirmation hearing was scheduled for December 19, 2000 (nine days before the proof of claim was filed). Associates did not file any objection to the Debtor's plan. The Order of Confirmation was signed on January 23, 2001, approximately one month after Associates filed its proof of claim.

A Notice to Allow Claims,[3] dated March 2, 2001, listed Spatari as having filed a secured claim for $6,282.86. It also indicated that Associates did not file a claim with respect to $6,541, the amount listed by the Debtor in her Petition.

According to the records of the chapter 13 trustee ("Trustee"), on or about March 16, 2001, his office sent the Debtor and the Debtor's attorney a "Notice of Disputed Claim," which identified that Claim No. 7 had been filed in the name of "Spatari." The form indicates that "the claim was filed as secured . . . but was listed in the plan and/or schedules to be treated as a general unsecured creditor. We are required to pay this creditor as secured unless we receive a motion to reclassify the claim within the next thirty days."

According to the Trustee, the "hold" was taken off the claim of Spatari/Associates on or about May 2, 2001, and he began to make disbursements in May 2001. Beginning in September 2001, and every six months thereafter, according to the Trustee, the Debtor and the Debtor's attorney were provided with copies of the ledger in the case showing disbursements.[4] According

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[3] Pursuant to Local Rule 3007-1, an objection to a claim in a chapter 13 case must be filed and served within 90 days of the Trustee's service of a "Motion to Allow Claims." As has been found in other cases, it does not appear that the Trustee makes such a motion. Instead, he simply serves a Notice to Allow Claims on the Debtor and Debtor's counsel.

[4] The Trustee has provided the Court with a copy of the ledger in the case, which shows disbursements to Spatari beginning May 4, 2001, and continuing through August 4, 2003, totaling $3,187.81, the amount alleged by the Debtor in her motion to have been paid to Associates.

to the Debtor, Spatari/Associates had been paid a total of $3,187.81 by the Trustee as of August 19, 2003. *See* Affirmation of Wayne Bodow, Esq., dated August 19, 2003.

Debtor's counsel indicates that "[a]fter a series of staff changes at Debtor's attorney's office, the matter was brought to the attention of your affiant's staff, whereupon a review of the debtor's filed plan and claims was performed" and the motion presently under consideration was filed some 33 months into the Debtor's 36 month plan. *See* Debtor's Memorandum of Law, filed October 17, 2003, at ¶¶ 10 and 11.

DISCUSSION

The facts as set forth herein closely parallel those confronting the Ninth Circuit Bankruptcy Appellate Panel in *In re Shook*, 278 B.R. 815 (9th Cir. BAP 2002). In that case, the debtors filed a chapter 13 petition on January 25, 1996. *Id.* at 818. They listed the claim of Contractors Bonding and Insurance Co. ("CBIC") as unsecured in the amount of $15,145.66, despite the fact that CBIC held a judgment against them. *Id.* The basis for listing CBIC as unsecured rested on the value of the residence, which they believed to be fully encumbered. *Id.* at 820. CBIC was not specifically mentioned in the plan provisions as being either a secured or an unsecured creditor. *Id.* at 818. Prior to confirmation of the debtors' plan on March 12, 1996, CBIC filed a timely proof of claim asserting a secured claim. On June 17, 1996, the trustee filed and served a Notice of Intent to Pay Claims, including what was identified as the secured claim of CBIC for $11,864.83. *Id.* at 819. The notice indicated that CBIC's claim would be deemed

allowed for distribution purposes unless the debtors objected to it within 30 days. *Id.* The debtors failed to object until December 20, 2000, when, in the process of selling their residence, it came to their attention that CBIC had been paid, rather than the Internal Revenue Service, as envisioned by the debtors' plan. *Id.* Debtors' counsel gave as his reason for not having objected to the claim previously that he had "overlooked" it. *Id.* at 820.

The debtors in *Shook* argued that based on the confirmed plan, CBIC had an unsecured claim since it had not objected to the plan prior to confirmation. *Id.* at 821. CBIC contended that the debtors' objection to its claim was barred by the confirmed plan. *Id.*

As in *Shook*, the Debtor herein listed Associates' claim as unsecured and made no explicit provision for its claim in the plan. In addition, the Debtor failed to object to Associates' proof of claim when she first received notice from the Trustee in March 2001 of his intent to pay Associates as a secured creditor.

As noted by the court in *Shook*, upon the timely filing of a proof of claim, the claim is deemed allowed and constitutes *prima facie* proof of the validity of the claim absent a written objection from a party in interest. *Id.* at 821, citing 11 U.S.C. §§ 501(a) and 502(1), as well as Rules 3001(f) and 3002 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). Thus, here, at the time the confirmation order was signed, Associates held an allowed secured claim entitled to distribution. Debtor's listing the claim as unsecured in her schedule was insufficient to reclassify Associates' claim. *Id.* at 823. Nor did the Debtor's plan give clear notice to Associates of her intent that the plan somehow value its claim and avoid its lien. Thus, there was no reason for Associates to have objected to the Debtor's plan. As indicated by the court in *Shook*, "[a] plan that is silent about the fate of a secured claim provides no notice of what will happen to the secured claim and therefore cannot effectively avoid a lien or determine its value."

Id. at 824 (citations omitted); *see also Deutchman v. Internal Revenue Service (In re Deutchman)*, 192 F.3d 457, 461 (4th Cir. 1999) (finding that a chapter 13 plan does not "provide for" a lien "simply by failing or refusing to acknowledge it or by calling the creditor unsecured"); *In re Friedman*, Case No. 92-62916, slip op. at 13 (Bankr. N.D.N.Y. Jan. 5, 1994) (citations omitted) (indicating that a plan which addresses claim allowance and/or lien disposition must provide notice sufficient to inform the secured creditor of an intent to reclassify its claim).

The court in *Shook* concluded that the debtors' plan could not bind CBIC to an unsecured status because they had not "provided for" CBIC's allowed secured claim. *Shook*, 278 B.R. at 827, citing *In re Beard*, 112 B.R. 951, 954 (Bankr. N.D. Ind. 1990) (stating that "[e]ven 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 this case, the Debtor knew of Associates' judgment and chose not to file a motion pursuant to Code § 506 to determine its secured status until some 33 months into her plan. Under those circumstances, "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." *Id.* at 956. Accordingly, Associates was entitled to distribution by the Trustee in the amount of its allowed claim, based on its proof of claim, given the fact that the Debtor had not otherwise expressly "provided for" Associates allowed claim and lien in her plan. *See Shook*, 278 B.R. at 827.

With respect to Associates' defense of laches to the Debtor's motion, Debtor argues that because the rules do not specify a limitations period to object to the allowance of Associates' proof of claim, she is entitled to make her objection now. Indeed, Fed.R.Bankr.P. 3002 does not provide a time limit for objecting to a proof of claim. However, as noted by the court in *Shook*, some courts view the postconfirmation challenge to proof of a secured claim as being prohibited

as a collateral attack on the provisions of the plan and any objection is barred by Code § 1327(a), which provides that a confirmed plan binds both the debtor and the creditors. *Id.* at 828 (citations omitted). The court in *Shook* was "not inclined to make such a blanket ruling." *Id.* at 829. Instead, it found that Code § 1327(a) "may be harmonized [with Code § 502(a)] by interpreting § 1327(a) as dictating that the plan binds the parties to the amount the trustee will distribute under the plan, but is not binding as to the amount of the claim" in the case where the amount listed in the plan differs from that listed in the proof of claim. *Id.* at 829 (citation omitted).

Notably, the court in *Shook* recognized that because in some districts the bar date occurs after confirmation, it was necessary that there be flexibility in allowing claim objections postconfirmation. *Id.* n.15. Indeed, this Court recognizes that it is often the case in this district that the bar date occurs after the debtor's plan has been confirmed. In this case, the confirmation hearing occurred on December 19, 2000, and the confirmation order was signed on January 24, 2001. The bar date for filing a proof of claim was February 6, 2001. Associates filed its proof of claim on December 28, 2000, approximately one week after the confirmation hearing and approximately a month before the order confirming Debtor's plan was signed.

Fed.R.Bankr.P. 3012 authorizes the Court to determine the value of a claim secured by a lien on property after a hearing on notice to the holder of the secured claim. "The timeliness of a valuation determination under Rule 3012 depends 'on the purpose for which it is sought.'" *Id.*, quoting 9 COLLIER ON BANKRUPTCY ¶ 3012.01, at 3012-2. (Lawrence P. King et al. eds., 15th ed. Rev. 2002). As noted previously, the Debtor did not explicitly identify Associates or the value of its claim in her plan. Nor did Associates identify the value of any collateral allegedly securing its claim. In *Shook* the court concluded that the valuation motion should have been made before CBIC had been paid the full amount of its secured claim. *Id.* This is to be

distinguished from the facts herein, namely that Associates has not received full payment on its claim. According to the Debtor, at the time she filed her motion Associates had received $3,187.81 of the $6,282.86 listed in its proof of claim.

Whether to allow the Debtor an opportunity to object to Associates' claim, as filed, pursuant to Code § 506, and to have the Court value the collateral securing the claim, depends on whether Associates' assertion of the defense of laches is appropriate under the circumstances. As noted by the court in *Shook*, "[g]enerally, when an action is not subject to a statute of limitations, the equitable doctrine of laches may alternatively limit the time within which the action must be brought." *Id.* (citations omitted).

"Laches is based on the maxim, '*vigilantibus non dormientibus aequitas subvenit*,' meaning 'equity aids the vigilant, not those who sleep on their rights.' . . . It is an equitable defense that 'bars a plaintiff's . . . claim where he is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.'" *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998), quoting *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997). The inquiry concerning whether or not the equitable doctrine of laches applies is a factual one left to the Court's discretion. It requires the Court to determine, under the circumstances of this case, (1) whether the Debtor knew of her right to challenge the proof of claim asserting a secured claim; (2) whether the Debtor's delay in taking action to challenge Associates' claim was excusable; and (3) whether Associates was prejudiced as a result of the Debtor's delay in taking action.

In this case, the Debtor delayed approximately 33 months from the time Associates filed its proof of claim on December 28, 2000, to the time Debtor filed her motion on August 21, 2003, seeking a determination of the secured status of Associates' claim pursuant to Code § 506. At

the time she filed her plan, Debtor was aware of Associates' judgment. Indeed, an income execution had been served on her employer and her wages were being garnished prepetition as a result. *See* Debtor's Statement of Financial Affairs, as well as her Plan. Following confirmation of her plan on January 23, 2001, the Debtor and Debtor's counsel were given notice by the Trustee in March of 2001of his intention to pay Spatari/Associates, as a secured creditor, the amount of $6,282.86 unless the Debtor filed a motion to reclassify the claim within thirty days. Disbursements were begun in May 2001 by the Trustee to Associates in the absence of any such motion and Associates allegedly had received $3,187.81 at the time the Debtor filed her motion. This fact is distinguishable from *Shook* in which CBIC had been paid in full and had released its lien on the debtors' residence when the debtors objected to its claim. The court in *Shook* concluded that laches applied and that the debtors were not entitled to disgorgement of the monies by CBIC based on the debtors' "inactivity and long-dormant inattention to detail." *Shook*, 278 B.R. at 831.

Reviewing the factors upon which a court is to determine whether laches applies, it is clear to the Court that Debtor's counsel knew of the Debtor's right to challenge Associates' proof of claim, which asserted a secured claim, particularly in light of the notices sent by the Trustee early on in the case, and that the Debtor's delay in taking action to challenge Associates' claim for almost three years was inexcusable. Indeed, the Court notes that pursuant to Local Rule 3007-1, absent a court order approving an extension of time, objections to claims in chapter 12 and 13 cases must be filed and served within 90 days of the trustee's service of the "Notice of Claims Filed" in the Albany division of the Court and within 90 days of the trustee's service of the "Motion to Allow Claims" in the Utica division of the Court. While it appears that the Trustee filed and served a "Notice of Claims Filed," rather than a "Motion to Allow Claims,"

Debtor's counsel is certainly familiar with the Trustee's procedures in this part of the district and should have filed a motion objecting to Associates' claim at the latest by mid-June 2001. Under those circumstances, the Court concludes that Associates, through no fault of its own, would be seriously prejudiced if the Court were to require it to disgorge the monies paid to it by the Trustee, allegedly totaling $3,187.81, through August 21, 2003, when Debtor filed her motion. As noted by the court in *In re Windom*, 284 B.R. 644 (Bankr. E.D. Tenn. 2002), "[a] bankruptcy court must weigh the benefits and burdens in deciding whether to enter a disgorgement order in an effort to reach 'a just result.'" *Id.* at 648, citing *In re Vecchio*, 20 F.3d 555, 560 (2d Cir. 1994). In *Windom*, the creditor had filed its proof of claim subsequent to the bar date and the debtor had waited almost three years to object to the claim based on its untimeliness. The court concluded that the debtor "had waited an unreasonable amount of time to object" and declined to require that the creditor disgorge the payments received from the chapter 13 trustee despite the fact that its proof of claim had been untimely. *Windom*, 284 B.R. at 649.

The Court, however, will schedule an evidentiary hearing to determine the extent to which Associates' claim was secured at the time the Debtor filed her petition on September 12, 2000. If, as the Debtor alleges, the claim was totally unsecured at that time or secured only to the extent of payments made to date, the Court will reconsider the allowance of Associates' claim, as filed, pursuant to Code § 502(j), but only with respect to the balance of payments not yet made by the Trustee on that claim.

Based on the foregoing, it is hereby

ORDERED that Debtor's motion, to the extent that it seeks disgorgement of the monies paid to Associates of $3,187.81 as of August 21, 2003, is denied; it is further

ORDERED that the Trustee is to cease payments to Associates, retroactive to August 21,

2003 until further Order of this Court; and it is further

ORDERED that an evidentiary hearing pursuant to Code § 506(a) be scheduled for Thursday, April 1, 2004, at 9:00 a.m., at Utica, New York, at which time the Debtor will have the burden to present proof that Associates' deficiency claim, as asserted in its proof of claim, based on the judgment entered in State Court on August 2, 2000, was unsecured insofar as Debtor's assets were concerned at the time the Petition was filed.

Dated at Utica, New York

this 18th day of February 2004

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge