UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CHRISTY LEE COSS	CASE NO. 02-65893
Debtor	Chapter 13

APPEARANCES:

LAW OFFICE OF EDMUND J. GEGAN, PLLC Attorneys for CitiMortgage 2560 Burnet Ave. Syracuse, New York 13206	EDMUND J. GEGAN, ESQ. Of Counsel
SHAW, O'BRIEN, CROWLEY & REYNOLDS Attorneys for Debtor 55 Main Street Binghamton, NY 13905	KIERNAN M. CROWLEY, ESQ. Of Counsel
MARK W. SWIMELAR, ESQ. Chapter 13 Trustee 250 South Clinton St., Suite 504 Syracuse, New York 13202	

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

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

Under consideration by the Court are two motions filed on behalf of CitiMortgage in the chapter 13 case of Christy Lee Coss ("Debtor"). The first motion, filed on October 21, 2004, seeks relief from the automatic stay pursuant to § 362(d) of the Bankruptcy Code ("§ 362(d) Motion), 11 U.S.C. §§ 101-1330 ("Code"), in connection with real property located at Route 206, Masonville, New York. The Debtor filed opposition to the § 362 Motion on October 28, 2004. The second motion, filed on January 28, 2005 by CitiMortgage ("Reconsideration Motion"),

requests that the Court reconsider an Order, signed December 20, 2004, confirming the Debtor's chapter 13 plan ("Confirmation Order"). This too was opposed by the Debtor on February 23, 2005.

The § 362(d) Motion was originally scheduled to be heard on November 9, 2004 in Binghamton, New York. It was adjourned to January 11, 2005, in anticipation that the parties would be able to resolve the motion. The Reconsideration Motion was scheduled to be heard on February 24, 2005. Both motions ultimately were adjourned to March 8, 2005. The Court heard oral argument on the latter date and allowed the parties an opportunity to file memoranda of law concerning whether the Court may reconsider the Confirmation Order or whether it is limited by Code § 1330(a).[1] The Court heard further oral argument on April 12, 2005, and adjourned both motions to May 10, 2005. The Court requested supplemental memoranda of law on the applicability of Code § 1322(b)(2) to the facts of this case. The Court took the Reconsideration Motion under submission on May 10, 2005, indicating that it would issue a written decision.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (G), (L) and (O).

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[1] Code § 1330(a) provides that a court may revoke an order of confirmation only "if such order was procured by fraud." 11 U.S.C. § 1330(a).

FACTS

The Debtor filed a voluntary petition ("Petition") pursuant to chapter 7 of the Code on October 1, 2002. Debtor listed real property consisting of a "1993 Tan Trailer on 1.4 acres of land in Masonville, New York" with a value of $27,500, subject to a secured claim of $29,500. *See* Schedule A, attached to Debtor's Petition. Debtor also listed CitiMortgage as holding a secured claim for $30,011.82, secured "on land and trailer." *See* Schedule D, attached to Debtor's Petition. The Debtor was granted a discharge on February 20, 2003, and the case was closed on March 28, 2003.

On May 20, 2003, the case was reopened. Approximately a year later, on April 26, 2004, the Debtor filed amended schedules. Listed on Amended Schedule A is real property consisting of 1.4 acres of land in Masonville, New York, with a value of $15,000, subject to a secured claim of $29,500. The 1993 Tan Trailer ("trailer") was listed separately as personal property with a value of $10,000. *See* Amended Schedule B. The trailer was claimed as exempt as Debtor's homestead. *See* Amended Schedule C. According to Amended Schedule D, CitiMortgage has a secured claim with respect to the "land."

On June 11, 2004, the chapter 7 trustee in the reopened case, James C. Collins, Esq. ("Collins"), filed a motion to compel the Debtor and CitiMortgage to turnover all records regarding the Debtor's trailer, "including proof of perfection of CitiMortgage of the filing of the UCC-1 in the appropriate County Clerk's Office . . . ." The trustee's motion was to be heard on July 1, 2004; however, on July 1, 2004, the Court signed an ex parte Order converting the case

to one pursuant to chapter 13 of the Code at the Debtor's request. [2]

On July 1, 2004, the Debtor filed her chapter 13 plan ("Plan") and the hearing on confirmation was set for September 14, 2004. CitiMortgage filed a proof of claim in the amount of $29,682.25 on August 6, 2004, classified as a secured claim. The Plan, consisting of a two page document, provides for monthly payments of $398 for a period of sixty months. Under the heading of Secured Claims, the Debtor states that

> The mortgage claim held by Citimortgage, existing as a lien on the Debtor's real estate, located at 2882 State Highway 206, Unadilla, New York 13849. It has been determined that this secured claim applies only to the Debtor's real estate consisting of 1.4 acres of land. The creditor did not perfect its lien on the 1993 manufactured home. The manufactured home is not attached to the real estate.
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> As a result, Debtor will cram down this claim, paying the secured creditor within the Chapter 13 Plan. The bifurcated claim shall consist of a secured balance of $15,000, with unsecured portion of $14,500, treated as provided in paragraph 2c.[3] The contract rate of interest on the secured portion is 8.75%.

Paragraph 2(b)(i) of the Plan.

No objection to the Plan was filed by CitiMortgage and, ultimately, the Court signed the Confirmation Order on December 20, 2004. As noted above, CitiMortgage filed its Reconsideration Motion approximately a month later on January 28, 2005.

The mortgage, which serves as the basis for the claim of CitiMortgage, was executed on or about February 25, 2000, in the amount of $30,500, "given to secure a portion of the purchase

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[2] On August 16, 2004, the Court signed a conditional order in connection with Collins's motion to compel, which, *inter alia*, provided that the case be converted back to a case under chapter 7 in the event that the Debtor's chapter 13 plan failed.

[3] Paragraph 2(c) provides for a minimum dividend of 7% to all unsecured creditors.

price of the above-described premises and is a purchase money mortgage." *See* Exhibit A of § 362(d) Motion. The "above-described premises" included a parcel of land situated "in the Town of Masonville, Delaware County, State of New York." *Id.* In addition to the legal description set forth in Schedule A of the mortgage, the "description of the property" also included "[a]ll buildings and other improvements that are located on the Property" and "[a]ll fixtures that are now or in the future will be on the Property . . . ." *Id.* There are no indications when the trailer was moved to the parcel of land. The Debtor's counsel indicates that the trailer is not permanently affixed to the real estate. According to CitiMortgage, the Debtor defaulted on her payments on the mortgage on August 1, 2004, and $29,445.48 is due and owing to CitiMortgage. *See* § 362(d) Motion at ¶ 4.

DISCUSSION

Reconsideration of Confirmation Order based on Alleged Failure to Comply with Code § 1322(b)(2)

CitiMortgage contends that the Confirmation Order should be vacated because modification of its claim secured by the Debtor's principal residence is not permitted pursuant to Code § 1322(b)(2). Generally, an order confirming a chapter 13 plan is not revocable unless it is established that the order was procured by fraud. 11 U.S.C. § 1330; *Universal American Mortgage Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 830 (11th Cir. 2003); *In re Fesq*, 153 F.3d 113, 120 (3rd Cir. 1998); *In re Szostek*, 886 F.2d 1405, 1406 (3d Cir. 1989). In this case, CitiMortgage has made no allegations of fraud on the part of the Debtor.

In support of its position, CitiMortgage directs the Court to *In re Escobedo*, 28 F.3d 34 (7th Cir. 1994). In that case, the debtor's chapter 13 plan, which provided for monthly payments of $25 over thirty-six months, had been confirmed sometime in 1987. *Id.* The trustee filed a "late" objection to confirmation, asking that the court allow certain administrative and tax claims totaling $24,158. The court granted the request of the trustee without any objection by the debtor. However, the debtor never modified her plan and continued to make the $25 monthly payments. Two years after the debtor's last payment and almost five years after plan confirmation, the trustee asked that the payment schedule be modified or that the case be dismissed. *Id.* The bankruptcy court dismissed the case. The District Court affirmed, as did the Court of Appeals for the Seventh Circuit. The Seventh Circuit found no merit in the debtor's argument that the confirmation order had res judicata effect which barred the court from dismissing her case. The court concluded that dismissal was appropriate because of the plan's failure to comply with the mandatory provisions of Code § 1322(a)(2), which requires the payment of administrative priority claims in full. *Id.* at 35.

In *In re Carr*, 318 B.R. 517 (Bankr. W.D. Wis. 2004), the creditor filed a motion seeking to have the order of confirmation vacated. The debtor argued that because she "put her real estate to other uses than merely her residence," Code § 1322(b)(2) was not applicable. The court in *Carr* made note of the fact that an order confirming a plan to which there was no objection filed is generally not revocable except upon a finding of fraud pursuant to Code § 1330. *Id.* at 520. The court went on to note that "[c]ourts in the Seventh Circuit, however, have taken a different view." *Id.* The court explained its policy of confirming plans quickly and found that "[o]ur policy can work only if the confirmation can be reviewed and the order vacated when the claims

actually filed alter the assumptions on which the confirmation was granted. To that extent, the confirmation order is effectively provisional. A plan whose terms violate the Code cannot be allowed to trump a presumptively valid secured claim." *Id.* at 521. The court concluded that it was bound by Seventh Circuit precedence and that "the result in this case must be the same as the result in *Escobedo* - the debtor's plan confirmation must be deemed nugatory." *Id.*

This Court does not agree with the conclusions of either court in *Escobedo* or *Carr.* Both appear to have ignored the overwhelming authority upholding the preclusive effect of final orders, including confirmation orders. Specifically, Code § 1327(a) provides that "[t]he 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." 11 U.S.C. § 1327(a). The majority of courts hold that a creditor who fails to object to a plan or to appeal a confirmation order is without a basis for challenging a provision of the confirmed plan, even if it is inconsistent with the Code. *See, e.g. Bateman*, 331 F.3d at 822 (indicating that a secured creditor, who has failed to object to the plan or to appeal from it, cannot collaterally attack a confirmed plan even though it may not comply with the mandatory provisions of the Code); *In re Simpson*, 240 B.R. 559, 562 (8th Cir. BAP 1999) (noting that the "[t]he sum of the judicial decisions that have considered the statutorily binding effect of a confirmed plan of reorganization is that if the confirmed plan treats the creditor, and if the creditor received proper notice of the plan and its proposed confirmation, the creditor's only potential remedy for a plan it doesn't like is to appeal the order of confirmation"); *In re Whelton,* 312 B.R. 508, 515 (D. Vt. 2004); *In re Stewart,* 247 B.R. 515, 521 (Bankr. M.D. Fla. 2000) (stating that "[a] Chapter 13 plan's failure to comply with § 1322(b)(2) is a ground for

a valid objection to or appeal from a confirmation order, but not a legitimate ground to attack a plan"); *In re Walker*, 128 B.R. 465, 467 (Bankr. D. Idaho 1991), citing to 5 L. King, COLLIER ON BANKRUPTCY, ¶ 1327.01[1] (15th ed. 1990) (noting that the binding effect of a chapter 13 plan extends to "any issue necessarily determined by the confirmation order, including whether the plan complies with sections 1322 and 1325 of the Bankruptcy Code").

In this case, the language in the Plan regarding the treatment of CitiMortgage's claim was clear and unambiguous. The Debtor took the position that because CitiMortgage had not perfected its lien on the trailer and because the trailer was not permanently affixed to the real estate securing CitiMortgage's claim, CitiMortgage's security interest did not extend to her residence, thereby making Code § 1322(b)(2) inapplicable and allowing the Debtor to modify the claim. Under the terms of the Plan, CitiMortgage's claim was secured in the amount of $15,000, the alleged value of the real estate on which the trailer sits, and unsecured in the amount of $14,500. This Court concludes that even if it were determined that Code § 1322(b)(2) was applicable, that factor alone would not serve as a basis for the Confirmation Order to be either revoked or vacated in the absence of a timely objection to the Plan or a timely appeal of the Order.

Reconsideration of Confirmation Order based on Failure to Commence an Adversary Proceeding

While CitiMortgage has not referred to any specific rule or statute, the Court deems it appropriate, under the circumstances, to consider this aspect of the Reconsideration Motion pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), which incorporates Rule 60(b)(4) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.Rule"). *See*

In re Ruehle, 307 B.R. 28, 33 (6th Cir. BAP 2004); *Whelton*, 312 B.R. at 518. This approach allows a court to vacate a judgment or order to the extent that it is found to be void because the court issuing it "acted in a manner inconsistent with due process of the law." *Id.*; *see also Ruehle,* 307 B.R. at 33 (noting that a "judgment is void if the court lacked jurisdiction over the affected party because of a lack of notice resulting in a violation of due process"); *Pardee*, 218 B.R. at 935 (Klein, J., dissenting in part) (indicating that a judgment that is void is a legal nullity). The reason for taking this approach will become obvious based on the subsequent analysis of the issues by the Court.

On August 6, 2004, CitiMortgage filed its proof of claim asserting a secured claim of $29,682.26, including $378.75 in prepetition arrears. A proof of claim is prima facie evidence of the validity and amount of a claim pursuant to Fed.R.Bankr.P. 3001(f). However, the proof of claim does not determine the amount of the secured portion of a claim pursuant to Code § 506(a). *In re Bennett*, 312 B.R. 843, 847 (Bankr. W.D.Ky. 2004). Rather, the valuation of a secured claim for purposes of Code § 506(a) is part of the confirmation process. *See In re Wolf*, 162 B.R. 98, 107 (Bankr. D.N.J. 1993). As further explained by the Hon. Keith M. Lundin, U.S. Bankruptcy Judge,

> [I]if notice was adequate and the procedural due process rights of the secured claim holder are respected, a bankruptcy court order fixing the value of collateral, determining the allowed amount of a secured claim or defining what the secured claim holder will receive in satisfaction of its lien rights is binding on all parties without regard to the label on the process.

3 Keith M. Lundin, CHAPTER 13 BANKRUPTCY § 233.1 (3d ed. 2000 & Supp. 2002); *see also In re Williams*, 276 B.R. 899, 908 (C.D. Ill. 1999) (indicating that "[d]etermining the secured portion of the creditor's claim in no way challenges the validity of the lien").

Thus, in this case the amount of CitiMortgage's claim was $29,682.26, in the absence of any objection by the Debtor, and the value of its secured claim was $15,000 under the terms of the Plan. However, CitiMortgage contends that the confirmation of the Plan should be vacated because it improperly challenges the extent of its lien without the required commencement of an adversary proceeding pursuant to Fed.R.Bankr.P. 7001(2). In support of its position, CitiMortgage cites to a number of cases which involved student loans and what some courts have referred to as "discharge by declaration."[4] *See, e.g., Poland v. Educational Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185 (10th Cir. 2004); *Banks,* 299 F.3d 296; *Ruehle,* 307 B.R. 28; *Whelton*, 312 B.R. 508.

In *Whelton* the district court vacated a portion of a confirmation order which provided for the discharge of a student loan obligation without any evidentiary determination of undue hardship. The court in *Whelton* acknowledged the decisions of *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999), a case cited by the Debtor herein, and *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (9th Cir. BAP 1998), which refused to vacate orders confirming plans providing for "discharge by declaration." Both of those courts relied strongly on the policy favoring finality in reorganization cases which "has led courts to give preclusive effect to a confirmation order, even if the confirmed bankruptcy plan contains

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[4] "[T]he process of seeking a discharge [of a student loan] without an adversary proceeding to establish undue hardship has been referred to as a 'discharge by declaration.'" *Banks v. Sallie Mae Servicing Corp. (In re Banks),* 299 F.3d 296, 301 (4th Cir. 2002); *see also New Jersey Higher Educ. Assistance Auth. v. Pennell*, 871 A.2d 671 (N.J. Super. App. Div. April 8, 2005) (presenting a thorough review and analysis of case law on the subject).

illegal provisions."[5] *Whelton*, 312 B.R. at 515. However, the court in *Whelton* found more merit to the reasoning of other decisions which concluded that only those questions which can be raised as contested matters are properly before a court in the context of confirmation. *Whelton*, 312 B.R. at 516. Specifically, the court in *Whelton* observed that

> "[a]lthough confirmed plans are res judicata to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor." *In re Enewally*, 368 F.3d 1165, 1173 (9th Cir. 2004); *see also Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 93 (4th Cir.1995) (confirmation of chapter 13 plan is res judicata only as to issues that can be raised in less formal procedure for contested matters, not matters that must be resolved in adversary proceeding); *In re Beard*, 112 B.R. 951, 955-56 (Bankr.N.D.Ind.1990) (if an issue must be raised through adversary proceeding it is not part of confirmation process; absent actual litigation confirmation will not have preclusive effect). Understandably, no one has here contended that the issue of the dischargeability of a student loan debt on the basis of undue hardship may be litigated as part of the confirmation process, as "the only questions which are properly before the court in the context of confirmation are those which can be raised as contested matters. Only as to issues of this kind will confirmation operate as res judicata." *Id.*

Whelton, 312 B.R. at 516. The court in *Whelton* ultimately concluded that the creditor had a right to expect that it would receive a summons and complaint if there was to be a determination on

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[5] As mentioned previously, the courts in *Andersen* and *Pardee* held that confirmation of plans providing for "discharge by declaration" was binding on the student loan creditors. However, at least one court has described *Andersen* as addressing the issue of "res judicata" while ignoring the issue of "due process." *See In re Lemons*, 285 B.R. 327, 331 (Bankr. W.D. Okla. 2002); *see also Ruehle*, 307 B.R. at 35 (pointing out that neither court in *Andersen* and *Pardee* had "looked into the deeper concept of whether the lenders had received notice reasonably calculated to apprize the lenders of the fact that their rights were in jeopardy and neither circuit considered whether the lenders' due process rights had in fact been violated").

the dischargeability of the student loan debt.[6] *Id.* at 517.

As noted by the court in *Banks*, "[w]hen the Bankruptcy Code and the Bankruptcy Rules specify the notice required prior to entry of an order, due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect." *Banks*, 299 F.3d at 302; *see also In re Moore*, 290 B.R. 141, 144 (Bankr. W.D. Mo. 2003) (noting that "[c]ourts recognize an exception to the finality of the confirmed plan if the creditor was denied due process for lack of notice"). In the cases involving the dischargeability of student loans, most courts have concluded that a student loan creditor is entitled to more than simply the notice provided by a provision in a plan providing for "discharge by declaration." Instead, such creditors are entitled to receive a summons and complaint from the debtor and to have the opportunity to litigate the issue of undue hardship before any determination of dischargeability of the debt is made.

The issue for this Court concerns whether the provision in the Debtor's Plan, which addressed the claim of CitiMortgage, required the commencement of an adversary proceeding.[7]

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[6] Code § 523(a)(8), applicable to the dischargeability of student loans, is "'self-executing' in that the creditor is not required to file a complaint to determine the nondischargeability of a student loan; rather the debtor must affirmatively secure a hardship determination [by means of an adversary proceeding]." *Whelton*, 312 B.R. at 513-14.

[7] Several published decisions have addressed objections to the treatment of claims ostensibly secured by an interest in both land and a mobile home pursuant to Code § 1322(b)(2) within the confirmation process and without the need for an adversary proceeding. *See, e.g.*, *In re Cluxton,* Case No. 04-8028, 2005 WL 1201469 (6th Cir. BAP May 19, 2005); *In re Thompson*, 217 B.R. 375 (2d Cir. BAP 1998); *In re Johnson*, 269 B.R. 246 (Bankr. M.D. Ala. 2001); *In re Speights*, 131 B.R. 205 (Bankr. N.D. Fla. 1991); *In re Carter*, 116 B.R. 156 (Bankr. W.D. Mo. 1990); *but see In re Nowlin*, 321 B.R. 678 (Bankr. E.D.Pa. 2005) (adversary proceeding commenced to bifurcate and "cram down" secured claim to the fair market value of plaintiff's mobile home).

As discussed by the court in *Beard*,

> The determination of the amount due on account of a creditor's claim and the value of a lien securing a claim are contested matters and, thus, may properly be dealt with during the confirmation process. A challenge which questions the validity or existence of a lien, its extent or the scope of the property encompassed by it, or the lien's priority in relation to other interests, however, requires an adversary proceeding. Disputes of this nature are not resolved by the confirmation process.

Beard, 112 B.R. at 956; *see also In re Zimmerman*, 276 B.R. 598, 602 (Bankr. C.D. Ill. 2001) (indicating that a chapter 13 plan may properly reduce or eliminate a lien based on the value of the collateral but any challenge to the validity, priority or extent of the lien requires an adversary proceeding). Thus, CitiMortgage was bound by the valuation of its collateral as set forth in the Debtor's Plan and was entitled to receive $15,000, plus interest, over the life of the Plan. However, it was not bound by any attempt to eliminate its lien for any other reason that lack of collateral value. *Id.*

What is not a proper part of the confirmation proceeding is any determination of the extent of CitiMortgage's lien, namely "the scope of the property encompassed by or subject to the lien." *Bennett*, 312 B.R. at 847. Fed.R.Bankr.P. 7001(2) expressly requires the commencement of an adversary proceeding "to determine the validity, priority, or extent of a lien or other interest in property."

The Court concludes that the service of a summons and complaint and the commencement of an adversary proceeding was not necessary in order to provide CitiMortgage with sufficient notice of the treatment of its claim. The notice provided by the Debtor to CitiMortgage in the form of her Plan satisfied its due process rights in this regard, and if CitiMortgage had an issue with the applicability of Code § 1322(b)(2), it should have objected to the Plan or appealed the

Confirmation Order. Accordingly, the Court must deny this aspect of the Reconsideration Motion, as well.

However, the Court also concludes that CitiMortgage's lien will survive any future bankruptcy discharge in the absence of an adversary proceeding in which a determination would be made by the Court as to the extent of its lien, namely, the scope of the property subject to CitiMortgage's lien under the terms of its mortgage and whether the trailer is permanently affixed to the land on which it sits so as to be subject to the mortgage held by CitiMortgage.[8] [9] Indeed, the Confirmation Order expressly provides that "[s]ecured creditors shall retain their liens unless ordered otherwise." Confirmation Order at ¶ 4.

With respect to CitiMortgage's § 362(d) Motion, the Court notes that the Debtor's Plan was filed on July 1, 2004, and was scheduled for a hearing on confirmation on September 14, 2004. The Plan provides for the regular monthly payments to CitiMortgage to be made through the Plan by the Trustee. CitiMortgage filed no objection to the Plan. On October 21, 2004, it filed its § 362(d) Motion seeking relief from the automatic stay on the basis that it had not

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[8] As best the Court can determine, there is no dispute concerning the fact that CitiMortgage failed to perfect its security interest in the trailer as a separate item of personal property, which arguably would also require the commencement of an adversary proceeding. Nor is there a dispute concerning the validity of CitiMortgage's mortgage and its perfected security interest in the real estate on which the trailer sits.

[9] The Court emphasizes that its conclusion in no way addresses whether a debtor may "strip off" a lien, as permitted in *In re Pond*, 252 F.3d 122 (2d Cir. 2001), as part of the confirmation process. *See, e.g., In re King*, 290 B.R. 641, 646-47 (Bankr. C.D. Ill. 2003). "'Strip off' is a term of art commonly used in bankruptcy proceedings to describe the process of changing a secured claim into an unsecured claim when the property securing the claim has no residual value.'" *First Bank, Inc. v. Van Wie*, Case No. NA02-0120-C, 2003 WL 1563959 at *1 (S.D. Ind. Jan. 8, 2003). This is to be distinguished from a "strip down" of an undersecured lien, reducing it to the value of the collateral to which it attaches. *See In re Tanner*, 217 F.3d 1357, 1358 n. 4 (11th Cir. 2000).

received any payments from the Debtor since July 2004. The Court signed the Confirmation Order on December 20, 2004.

Until the Debtor's Plan had been confirmed, the Trustee was without authority to disburse any monies to any creditor in advance of its confirmation. 11 U.S.C. § 1326 (a)(2). Thus, CitiMortgage had no basis to complain that the Debtor had not made those payments until the Plan was confirmed on December 20, 2004. *See In re Herrin*, Case No. 04-65488, 2005 WL 1308886 *2 (Bankr. N.D. Ind. April 28, 2005).

Based on the foregoing, it is hereby

ORDERED that CitiMortgage's Reconsideration Motion is denied and it is further

ORDERED that CitiMortgage's § 362(d) Motion is denied based on the Confirmation Order, which provides for payments to it through the Plan.

Dated at Utica, New York
this 14th day of July 2005

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge