

Civ. P. 12(b)(6). The parties submitted briefs and the Court took the matter under advisement.

3. Plaintiffs own real estate located at 421 Fletcher Drive, Smyrna, DE 19977 (the “Homestead”). Plaintiffs valued the Homestead on the Petition Date at \$343,496. [Docket No. 1]. The Homestead is subject to a first mortgage in the amount of \$295,588.68. [Proof of Claim 14]. The Defendant holds a second mortgage secured by the Homestead that Plaintiffs valued on the Petition Date at \$114,962. [Docket No. 1, AP Docket No. 1]. Plaintiffs admit the Homestead is their primary residence. [AP Docket No. 1].

4. Plaintiffs filed a Chapter 13 Plan on March 24, 2017 stating Citicorp would receive no payment on account of its claim. It further provided that the Debtors would file an adversary to determine the avoidability of the Defendant’s mortgage lien.

5. This Court entered an Order [Docket No. 26] confirming Plaintiffs’ Chapter 13 Plan (“Confirmation Order”), which stated in relevant part that any actions to determine the avoidability of liens were required to be filed within ninety days after the claims bar date. The claims bar date lapsed on January 3, 2017 and the time to file an adversary proceeding therefore expired on April 3, 2017. No action to challenge Defendant’s lien was filed by that date.

6. Defendant has moved to dismiss this adversary proceeding on the grounds that the Complaint is untimely and that it does not articulate any theory upon which the Plaintiffs could avoid the lien.

STANDARD OF REVIEW

7. Fed. R. Civ. P. 12(b)(6) (made applicable through Bankr. R. 7012) governs a motion to dismiss for failure to state a claim upon which relief can be granted. “The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case.” *Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.)*, 496 F.Supp. 2d 404, 407 (D.Del 2007). When reviewing a motion to dismiss, the Court will construe the complaint “in the light most favorable to the plaintiff.” *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 220 (3d Cir. 2011).

8. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief require more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (internal citations omitted).

ANALYSIS

9. As noted above, the Confirmation Order required that any adversary proceeding to avoid Defendant’s lien be filed within ninety days after the claims bar date. The claims bar date was January 3, 2017 and the time to file an adversary

proceeding expired on April 3, 2017. Plaintiffs filed their Complaint on April 25, 2018, over a year after the time prescribed by the Court in the Confirmation Order. Plaintiffs' Complaint is untimely and will be dismissed.

10. Even if the Complaint had been timely filed, the Plaintiffs have not stated a claim upon which relief can be granted. Plaintiffs argue the second mortgage lien is avoidable based on the language in the Plan. The confirmed Plan states that no payment will be made to the Defendant and that an adversary proceeding would be brought to avoid the lien. Plaintiffs argue the confirmed Plan is binding and, because it did not provide for any payment toward the second mortgage, Defendant is estopped from asserting its lien rights against the Homestead. Plaintiffs also allege Defendant represented that it had "charged off the loan," refused to participate in the bankruptcy, did not respond to Plaintiffs' letters, and should therefore be estopped from asserting its lien rights.

11. Under 11 U.S.C. § 1322(b)(2), a Chapter 13 plan may not modify the rights of a secured creditor whose claim is secured only by the debtor's principal residence. If any part of a creditor's claim is secured, then the entire claim—both the secured and unsecured portions—cannot be modified. *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606,612 (3d Cir. 2000). Put more directly, if any portion is secured, the whole claim must be treated as secured. *Id.* This rule is colloquially known as the "one dollar rule." *Id.* at 613-14 ("[T]he creditor with only a dollar's value of security in the property . . . can invoke the antimodification clause [under § 1322(b)(2)].").

12. The Complaint does not assert facts sufficient to form an action to evade the antimodification provision in § 1322(b)(2). The Complaint acknowledges the Homestead is Plaintiffs' primary residence, but it does not allege that Defendant's mortgage is "out of the money"—i.e., that the value of the Homestead is lower than the amount due on the first mortgage, leaving no equity for the second mortgage. Absent some allegation that there is no equity for the second mortgage, the Complaint does not assert facts sufficient to form the basis of a claim to avoid the lien under § 1322(b)(2) and controlling Third Circuit precedent.

13. Independent of § 1322(b)(2), Plaintiffs' reliance on the binding effect of the confirmed Plan and Confirmation Order also fails. The Plan states that no payments would be made toward Defendant's claim, but it does not invalidate the lien. Indeed, the Plan expressly provides that "holders of allowed secured claims shall retain the liens securing such claims" and that an adversary proceeding would be brought to determine the status of Defendant's individual lien. Similarly, the Confirmation Order did not affirmatively strip off the lien. It approved the Plan, "subject to resolution of actions to determine the avoidability . . . of liens." Plaintiffs cannot rely upon the Plan or Confirmation Order as a final determination that the lien was avoided when neither contained language expressly doing so.²

² Local Rule 3023-1 governs Chapter 13 plans and provides a plan must contain a notice section in the first paragraph if it includes any nonstandard provisions, including the treatment of junior liens on real estate. The Rule suggests a plan cannot by itself avoid a junior lien, but rather must be paired with an adversary proceeding to effectuate the lien avoidance. Specifically, it requires notice where the "[p]lan includes avoidance of junior liens on real estate, adversary to be filed, *and* treatment if any as to the unsecured claim of an avoided lienholder." (emphasis added). If the Plaintiffs intended for their Plan to effectuate the lien strip without an adversary, Local Rule 3023-1(b)(i)(B)(6) indicates that such a Plan is invalid because it does not contemplate the "adversary to be filed."

14. Plaintiffs' suggestion that the failure to file a proof of claim should preclude Defendant from asserting its lien rights is likewise unavailing. Under 11 U.S.C. § 506(d), a lien secured by a disallowed claim is still valid if the "claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim." In other words, the Code does not permit a debtor to avoid an otherwise valid lien simply because the lienholder did not file a proof of claim. Plaintiffs have not raised any facts that would suggest the lien is invalid for a reason other than Defendant's lack of participation in the bankruptcy. The fact the Defendant did not file a proof of claim does not by itself extinguish its lien.

15. Plaintiffs also invoke an estoppel theory, asserting Defendant failed to object to the Plan and represented the second mortgage was "charged off to zero." Based on that conduct, Plaintiffs allege Defendant is estopped from pursuing its lien rights in this adversary proceeding. This theory likewise fails. Under Delaware law, "[a]n estoppel may arise when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment." *Wilson v. Am. Ins. Co.*, 58 Del. 394, 398, 209 A.2d 902, 903–04 (1965). Plaintiffs have not pleaded facts that would show they relied on Defendant's representations to their detriment. Plaintiffs assert Defendant released the *claim*, but they do not allege that Defendant acted in a way to suggest it surrendered the *lien*. The factual allegations in the Complaint relate to the claim and Defendant's alleged failure to pursue a recovery on the claim in the Chapter 13 case—none of which relate to the avoidability of the lien. If anything, the Complaint supports the validity of the lien. The Complaint

alleges the “second mortgage was filed for record . . . subordinated . . . and then assigned to [Defendant].” It would therefore appear Plaintiffs do not dispute that the Defendant properly recorded and assigned the lien.

16. Finally, the Plan—which the Plaintiffs drafted and cited in their Complaint—unambiguously anticipated that the lien survived and the claim did not. Plaintiffs insist that Defendant’s failure to object to the Plan suggests Defendant intended to release the lien. But, again, the Plan proposed that secured creditors would retain their liens, but that no payment would be made on account of Defendant’s claim. Defendant’s lack of an objection indicates its consent to the treatment of its claim, but not the avoidability of the lien. In sum, the Complaint lacks any basis to support a conclusion that Plaintiffs believed the lien was released or that Defendant acted in such a way to imply it was extinguished.

17. As a fundamental principle, “although an underlying debt is discharged in bankruptcy, the lien created before bankruptcy against property to secure that debt survives.” *Estate of Lellock v. Prudential Ins. Co. of Am.*, 811 F.2d 186, 188 (3d Cir. 1987). The Complaint contains facts alleging that Defendant relinquished its claim, but it lacks an assertion Defendant released the lien. Absent a theory or set of facts under which they could avoid the lien, the Complaint does not plead facts that would support an action to avoid Defendant’s lien.

Based upon the foregoing, Defendant's Motion to Dismiss Plaintiffs' Complaint [AP Docket no. 5] is granted. The Plaintiffs' Complaint is dismissed with prejudice.

BY THE COURT:

Dated: October 26, 2018
 Wilmington, Delaware



Brendan Linehan Shannon
United States Bankruptcy Judge