

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF TENNESSEE  
SOUTHERN DIVISION

In re:

No. 02-18150  
Chapter 13

HAROLD WILLIAM HITCHCOCK  
NANETTE HENLEY HITCHCOCK

Debtors

HAROLD WILLIAM HITCHCOCK,  
NANETTE HENLEY HITCHCOCK,  
and C. KENNETH STILL, TRUSTEE

Plaintiffs

v.

Adversary Proceeding  
No. 03-1096

AMERIQUEST MORTGAGE COMPANY

Defendant

**MEMORANDUM**

Appearances: Robert J. Harriss, Harriss, Hartman Law Firm, P.C., Rossville, Georgia,  
Attorney for Debtors/Plaintiffs

Carol Walker Carter, Chattanooga, Tennessee, Attorney for  
Trustee/Plaintiff

Gordon D. Foster, Winchester, Sellers, Foster & Steele, P.C., Knoxville,  
Tennessee, Attorney for Defendant

HONORABLE R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

The chapter 13 trustee and the debtors brought this adversary proceeding against Ameriquest to avoid its lien on a house and lot owned by the debtors. Ameriquest's lien was created by a security deed, but for convenience, the court will refer to it as a mortgage.

Ameriquest has filed a motion for summary judgment. In addition to key facts that are not in dispute, the court takes judicial notice of the docket in the debtors' bankruptcy case, certain documents filed in the bankruptcy case, and the dates the documents were filed. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201; see, e.g., *Rickel & Assoc., Inc. v. Smith (In re Rickel & Assoc., Inc.)*, 272 B.R. 74 (Bankr. S. D. N. Y. 2002); *Northwestern Institute of Psychiatry, Inc. v. Travelers Indemn. Co. (In re Northwestern Institute of Psychiatry, Inc.)*, 268 B.R. 79 (Bankr. E. D. Pa. 2001); *In re Blum*, 255 B.R. 9 (Bankr. S. D. Ohio 2000); *Smith v. Weissfisch (In re Muzquiz)*, 122 B.R. 56 (Bankr. S. D. Tex. 1990).

The court also relies on the affidavit filed by Richard P. Jahn, Jr. Mr. Jahn was the chapter 7 trustee in the debtors' bankruptcy case before they converted it to a chapter 13 case. His affidavit deals with his abandonment of the all the property of the bankruptcy estate, including the house and lot.

The house and lot are located in Catoosa County, Georgia, but the mailing address is Rossville, Georgia, which is located in Walker County. *Slone v. Integra Bank/Pittsburgh (In re International Building Components)*, 159 B.R. 173 (Bankr. W. D. Pa. 1993), *on reconsideration* 161 B.R. 764 (Bankr. W. D. Pa. 1993) (judicial notice of geographic

facts). Ameriquest recorded its mortgage in Walker County but did not record it in Catoosa County before the debtors filed their bankruptcy case on December 18, 2002.

The debtors filed their bankruptcy case as a liquidation case under chapter 7 of the bankruptcy code. The debtors' bankruptcy schedules listed the house and lot as being located in Rossville, Catoosa County, Georgia. The meeting of creditors was held on January 24, 2003. On February 4, 2003, the chapter 7 trustee filed a notice of abandonment of all the debtors' property *except* the house and lot. The chapter 7 trustee had been informed that the mortgage on the house and lot was not recorded. He notified Ameriquest of the alleged failure to record the mortgage. Ameriquest provided him a copy of the mortgage showing the recording information. He noted the recording information but failed to notice that it was for Walker County instead of Catoosa County. He filed a notice of abandonment of all the debtors' property on February 21, 2003. If he had noticed that the recording was made in the wrong county, he would not have abandoned the property.

A short time later the chapter 7 trustee received a letter from the debtors' attorney stating that since the mortgage was not properly recorded, the debtors were converting their case to chapter 13. The debtors filed the motion to convert on February 24, 2003, three days after the trustee's abandonment of the house.

The chapter 7 trustee states that since the case was closed, his staff filed the letter from the debtors' attorney without his seeing it, and if he had seen it, he would have rescinded the abandonment and filed suit against Ameriquest or made sure the debtors converted their case to chapter 13.

Ameriquet argues that the avoiding powers of a bankruptcy trustee in a chapter 7 liquidation case can not be used by a chapter 13 trustee or debtor. As to the chapter 13 trustee, the failure of § 1302(b) to refer to § 704(1) could create some doubt as to whether the chapter 13 trustee can use the avoiding powers. 11 U.S.C. § 1302(b) & § 704(1). But chapter 11 follows the same pattern, and there is no doubt that a chapter 11 trustee or debtor in possession can use the avoiding powers. 11 U.S.C. §§ 704(1), 1106(a)(1) & 1107. The chapter 11 and 13 statutes do not refer to § 704(1) because it imposes a duty to liquidate assets. The right of a trustee to use the avoiding powers does not come from the list of duties imposed by § 704; it comes from the trustee's status as trustee and the wording of the statutes that create the avoiding powers. 11 U.S.C. §§ 544, 545, 547, 548, 549, 550 & 553; 11 U.S.C. § 323.

Next, Ameriquet argues that the debtors do not have standing to bring suit because only the chapter 13 trustee can exercise the avoiding powers to avoid the mortgage. Ameriquet points out that the debtors can use the trustee's avoiding powers to remove a lien from exempt property but not a lien voluntary given by the debtors, such as the lien created by the mortgage to Ameriquet. 11 U.S.C. § 522(g), (h).

Perhaps the court should reject this argument as irrelevant because the chapter 13 trustee is also a plaintiff in this proceeding, but the court has previously held that a chapter 13 debtor can exercise the trustee's avoiding powers for the benefit of unsecured creditors. *In re Dillard*, No. 98-12252 (Bankr. E. D. Tenn. Aug. 27, 1998). This decision requires some explanation in light of Ameriquet's contention that allowing the debtors to avoid the mortgage will give them a windfall.

Suppose, for example, the chapter 13 debtor owns non-exemptible property worth \$5,000 and subject to a lien to secure a \$10,000 debt. The chapter 13 trustee could avoid the lien under § 544 or § 547 but does not attempt to do so. 11 U.S.C. §§ 544 & 547. If the chapter 13 debtor uses the trustee's avoiding powers to avoid the lien, the debtor cannot exempt any part of the property's value. As a result, the debtor will be required to pay the value of the property into the chapter 13 plan for distribution on unsecured claims. 11 U.S.C. § 1325(a)(4).

The result is similar to what would happen in a chapter 7 liquidation. The value of the property goes to the unsecured creditors instead of the creditor whose lien is avoided. The main difference is that the debtor retains the property instead of it being sold by the bankruptcy trustee. The debtor in effect buys the property free of the avoided lien by paying the value to unsecured creditors, including the creditor whose lien is avoided. Avoidance of the lien increases the amount to be paid on unsecured claims. The "windfall" alleged by Ameriquest goes to the unsecured creditors.

Nothing in the record indicates that the debtors are attempting to do anything different in this bankruptcy case. In any event, a decision in this adversary proceeding is not a decision on confirmation of the plan. The court has confirmed the plan conditionally, and it is coming up for review at the same time that this adversary proceeding is set for trial.

Ameriquest argues that the abandonment of the property by the chapter 7 trustee prevents the debtors from avoiding the mortgage. The purpose of abandonment is to remove property from the bankruptcy estate. 11 U.S.C. § 554. The avoiding powers allow the

bankruptcy trustee to recover property or remove liens from property for the benefit of the bankruptcy estate — so that the property’s value can be used to pay unsecured claims in the bankruptcy case. Ameriquest argues that abandonment of the house and lot undercuts this purpose for using the avoiding powers. The argument is that since the house and lot have been abandoned, none of their value can be brought into the bankruptcy estate, and it follows that there is no reason to allow avoidance of the mortgage.

The weight of this argument turns on whether the abandonment can be set aside. The debtors contend the abandonment can be set aside because it resulted from mistake or inadvertence by the chapter 7 trustee. Ameriquest contends the abandonment is irrevocable.

Using “irrevocable” to describe abandonment is a practice that should itself be abandoned. Irrevocability can not be supported by the tautology that an abandonment is irrevocable because it puts the property out of the bankruptcy estate. That amounts to defining abandonment as irrevocable: since abandoned property is no longer part of the bankruptcy estate, it can not be brought back into the bankruptcy estate by setting aside the abandonment.

Moreover, the supposed general rule of irrevocability has always been hemmed in with conditions. An accurate statement of the rule should say: If the debtor provides the bankruptcy trustee with the information needed to make an informed decision as to abandonment, and the bankruptcy trustee investigates or has an adequate opportunity to investigate but fails to do so, and the trustee makes a reasoned decision to abandon the

property, then the abandonment cannot be revoked – especially if the only ground is that the asset has turned out to be worth more than the trustee expected or if another interested party has justifiably relied on the abandonment to its detriment by spending time, money, or effort to preserve the asset for its benefit. See *In re Lintz West Side Lumber, Inc.*, 655 F.2d 876 (7th Cir. 1981); *Dushane v. Beall*, 161 U.S. 499, 16 S.Ct. 637, 40 L.Ed. 791 (1896); *Sparhawk v. Yerkes*, 142 U.S. 1, 12 S.Ct. 104, 35 L.Ed. 915 (1891); *Webb v. Raleigh Hardware Co. (In re Webb)*, 54 F.2d 1065 (4th Cir. 1932); *Island Improvement Co. v. Holman*, 99 F.2d 63 (10th Cir. 1938); *Meyers v. Josephson*, 124 F. 734 (5th Cir. 1903); *In re Malcom*, 48 F.Supp. 675 (E. D. Ill. 1943).

This statement of the rule reflects the primary concerns of the courts. First, abandonment by the bankruptcy trustee in a liquidation case generally should be final because making it final promotes fast and efficient administration of the bankruptcy case. Second, abandonment should not deprive the creditors of a valuable asset for payment of their claims when the abandonment resulted from the trustee's receipt of inadequate or inaccurate information. Third, abandonment should not be undone when the debtor or another party, with the justifiable belief that the asset was properly abandoned, has invested significant time, effort, or money in preserving the asset for its benefit. Thus, the "rule" that abandonment is irrevocable indirectly states several grounds for revoking abandonment.

Since abandonment is usually done without a court order, one can argue that the grounds stated in Rule 60 for setting aside an order do not apply. 11 U.S.C. § 554(a), (b), (c); Fed. R. Bankr. P. 6007 & 9024; Fed. R. Civ. P. 60. Nevertheless, they provide a good framework for deciding when an abandonment can be set aside. Indeed, some of the grounds

stated in Rule 60(b) generally coincide with the grounds derived from the rule of irrevocability. Fed. R. Civ. P. 60(b)(1), (2), (3).

In particular, the trustee's abandonment in this case resulted from inadvertence. Apparently he was looking for any recording stamp and failed to notice that the recording stamp was for the wrong county. As to the rule of irrevocability, the trustee did not make a reasoned decision to abandon the house and lot. He obviously made a mistake.

The next question is whether the record shows that Ameriquest or any other party has detrimentally relied on the abandonment. The abandonment did not lift the automatic stay as to property of the debtors; it did not allow Ameriquest to foreclose. 11 U.S.C. § 362(a)(5), (c)(2). The early conversion to chapter 13 makes it doubtful that Ameriquest could have justifiably relied on the abandonment. In any event, the record does not show that Ameriquest has taken any actions with regard to the property itself in reliance on the abandonment. Ameriquest has relied partly on the abandonment to oppose the debtors' attempt to avoid the mortgage, but a dispute as to whether the abandonment can be set aside is not the kind of justifiable, detrimental reliance that should prevent the court from setting it aside.

The court concludes that the abandonment can be set aside as being the result of mistake or inadvertence. *In re Lintz West Side Lumber, Inc.*, 655 F.2d 876 (7th Cir. 1981); *Rameker v. Berning Garage (In re Alt)*, 39 B.R. 902 (Bankr. W. D. Wis. 1984); *Mendelsohn v. Ozer*, 241 B.R. 503 (E. D. N. Y. 1997) (no abandonment under § 554(c)); *Neville v. Harris*,

192 B.R. 825 (D. N. J. 1996) (no abandonment under § 554(c)); *In re Schmid*, 54 B.R. 78 (Bankr. D. Ore. 1985) (no abandonment under § 554(c) or abandonment revoked).

The *Mendelsohn*, *Neville*, and *Schmid* cases involved alleged abandonment under § 554(c) as the result of failure to administer a scheduled asset before the closing of the case. 11 U.S.C. § 554(c). Sometimes the facts of a case will justify a distinction between express abandonment under § 554(a) and abandonment under § 554(c) by failure to administer a scheduled asset. Certainly the courts are less likely to set aside an express abandonment under § 554(a) because it is presumably based on the trustee's considered judgment to abandon the scheduled asset. Of course, abandonment under § 554(c) by failure to administer the asset can also be based on the trustee's considered judgment as to that particular asset. The trustee may decide to abandon the asset but allow § 554(c) to bring about the abandonment instead of going through the procedure required for express abandonment under § 554(a). Fed. R. Bankr. P. 6007(a). Furthermore, there may be little factual or legal difference between the mistaken filing of an express abandonment under § 554(a) and the mistaken filing of a final, no asset report that leads to closing of the case and abandonment under § 554(c). 11 U.S.C. § 350(a); Fed. R. Bankr. P. 5009. Finally, the point of all the cases seems to be that an abandonment can be set aside by the court according to the usual rules for undoing prior actions by the court or a trustee unless a party has justifiably and detrimentally relied on the abandonment or the trustee merely underestimated the value of the asset as shown by later events.

The notice of abandonment states that it was served on the debtors' attorney, and it allowed the debtors fifteen days to object, but they did not file an objection. This failure

to object adds nothing to Ameriquest's argument. When a party fails to respond to a motion and the court enters an order, the party who failed to respond can still have the order set aside by proving grounds under Rule 60. See, e.g., *Manus Corp. v. NRG Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*, 188 F.3d 116 (3d Cir. 1999); *Poncebank v. Memorial Products Co. (In re Memorial Products Co.)*, 212 B.R. 178 (1st Cir. B.A.P. 1997); This situation is essentially the same.

Furthermore, the time limit for objecting to an abandonment is not like the time limits set in Rules 4003, 4004 and 4007; each of those is essentially a statute of limitations. Fed. R. Bankr. P. 4003(a), (b); 4004(a), (b); 4007(c). Even those time limits may be subject to equitable exceptions. *Nardei v. Maughan (In re Maughan)*, 340 F.3d 337 (6th Cir. 2003) (Rule 4007(c)).

The court should also point out that a trustee who has mistakenly or wrongfully disposed of trust property has a duty to attempt to recover it. See, e.g., *Miller & Lux, Inc. v. Anderson*, 318 F.2d 831 (9th Cir. 1963); *Teal v. Pleasant Grove Local Union N. 204*, 75 So. 335 (Ala. 1917); *In re First Nat. Bank*, 307 N.E.2d 23 (Ohio 1974); *Carl H. Christensen Family Trust v. Christensen*, 993 P.2d 1197 (Idaho App. 1999). The standing of the chapter 7 trustee to pursue this duty became questionable when the case converted to chapter 13. 11 U.S.C. § 348(e). The chapter 13 trustee is a plaintiff and doubtlessly has standing to have the abandonment revoked for the benefit of unsecured creditors. The debtors probably should be allowed to assert the trustee's rights for the benefit of unsecured creditors by creating a more favorable plan. On the facts of this case, however, the debtors should have standing independent of the chapter 13 trustee to ask that the abandonment be set aside. The

abandonment is detrimental to the debtors, and also to unsecured creditors, with regard to the kind of plan the debtors can propose that will meet the confirmation standards. The standing of the plaintiffs to seek revocation of the abandonment is not a problem in this proceeding.

The next question is whether the abandonment can be set aside as the result of this adversary proceeding or a different procedure is required. The chapter 7 trustee did not file a motion to set aside the abandonment, apparently because he was replaced by the chapter 13 trustee. 11 U.S.C. § 348(e). Neither the debtors nor the chapter 13 trustee has filed a motion in the bankruptcy case to set aside the abandonment. The filing of a motion in the bankruptcy case would be a correct way to bring up the question of whether the abandonment can be set aside, but it is not necessarily the only correct way. In bankruptcy cases, the same issue can come up in a variety of different procedural settings. The question has properly been raised in this adversary proceeding. If the court decides to set aside the abandonment, its order can also be filed in the bankruptcy case. Furthermore, the failure of a party to follow the exactly correct or usual procedure for raising an issue does not prevent the court from deciding the issue in a different kind of proceeding that provides essentially the same or better procedural rights and safeguards. *In re Klingbeil*, 119 B.R. 178, note 1 (Bankr. D. Minn. 1990); *In re Mark Twain Industries, Inc.*, 115 B.R. 948 (Bankr. N. D. Ill. 1991); *In re Zobenica*, 109 B.R. 814, 816 (Bankr. W.D. Tenn. 1990). The court concludes that the abandonment can be set aside as a result of this litigation and does not require a motion in the bankruptcy case.

The statutory rules regarding conversion of a case from chapter 7 to chapter 13 do not provide that the conversion negates a prior abandonment by the chapter 7 trustee. 11 U.S.C. § 348. In some situations, a prior abandonment should not be undone as a result of conversion to chapter 13. But the abandonment certainly should be undone in this case. If the debtors had filed a new chapter 13 case, the abandonment would have been meaningless because the new filing date would have determined what property came into the bankruptcy estate in the chapter 13 case. 11 U.S.C. § 541(a); *Jim Walters Homes, Inc. v. Saylor* (*In re Saylor*), 869 F.2d 1434 (11th Cir. 1989); 1 Keith M. Lundin, *Chapter 13 Bankruptcy* § 19.1. The court sees no good reasons for a different result in this case, especially since the conversion to chapter 13 occurred soon after the abandonment.

Finally, Ameriquest asserts that it should be equitably subordinated to the secured status of the prior lienholder who was paid with the proceeds of Ameriquest's loan. The undisputed facts do not even show that the prior lien was still perfected when the debtors filed their bankruptcy case. *Rinn v. First Union National Bank*, 176 B.R. 401 (D. Md. 1995). Other facts may also be relevant to whether the subrogation can be allowed or will entitle Ameriquest to judgment in its favor. See *Rouse v. Chase Manhattan Bank (In re Brown)*, 226 B.R. 39 (W. D. Mo. 1998); *Farmer v. LaSalle Bank (In re Morgan)*, 291 B.R. 795 (Bankr. E. D. Tenn. 2003); *Vieira v. Pearce (In re Pearce)*, 236 B.R. 261 (Bankr. S. D. Ill. 1999); The court will not grant summary judgment to Ameriquest on the equitable subrogation theory.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

ENTER:

BY THE COURT

---

R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

(Entered 10/03/03)