

Lien Avoidance

Jonathan and Cheryl Hunsaker, Case No. 12-64782-fra13

6/14/2013 FRA

Unpublished

Debtors purchased 17 acres, which included a farm dwelling (the Home Parcel), from the seller (Seller) of the property in 2006. The purchase was financed by Countrywide Home Loans, which recorded a trust deed against the 17 acre property. Debtors were thereafter notified by Marion County that the purchase of the Home Parcel, and its separation from the original 89 acre parcel, created an unlawful lot, the minimum lot size being 80 acres. The County consequently refused to issue permits for improvements on the property. To remedy this situation, Debtors purchased the remaining 72.36 acres from the Seller, granting the Seller a trust deed securing payment of the purchase price.

When Debtors filed bankruptcy, they filed a motion to value the 89 acre property and to avoid Seller's lien as wholly unsecured. They argued that because the initial sale of the Home Parcel created an unlawful lot, and that the illegality was necessarily cured by the sale of the remaining acres, the remaining acres should therefore be considered an "appurtenance" to the Home Parcel. As an appurtenance, Countrywide's lien would cover the entire 89 acres and be senior to the lien of the Seller.

The Court rejected the Debtors' argument. The Debtors' acquisition of the Home Parcel was clearly limited to the 17 acres and the remaining acreage could not be considered an appurtenance to the Home Parcel. The motion to avoid the Seller's lien was denied.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)	Bankruptcy Case
)	No. 12-64782-fra13
JONATHAN ELDON HUNSAKER, and)	
CHERYL LYNN HUNSAKER,)	
_____ Debtors.)	MEMORANDUM OPINION

Debtors filed a motion asking the Court to value real property they own and to avoid the lien of Aaron J. Updegrave as wholly unsecured.¹ Debtors assert that Updegrave’s claim is unsecured because the property subject to Updegrave’s claimed lien is worth less than the amounts secured by liens senior to Updegrave’s. Because at least a portion of the Debtors’ real property is subject only to Updegrave’s lien, the motion must be denied.

DISCUSSION

The Debtors own and reside on an 89.43 acre tract of land in rural Marion County, Oregon. The land is zoned for exclusive farm use. Land subject to this designation is subject to an 80 acre minimum lot size.

The Debtors purchased 17 acres, including a farm dwelling (hereinafter the “Home Parcel”), from the Updegraves in 2006. The acquisition, and the cost of subsequent remodeling, was financed through Countrywide Home Loans, which recorded trust deeds on December 8, 2006, and later on February 23, 2007.

¹ See *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002)(wholly unsecured lien on a primary residence may be avoided in a chapter 13 proceeding).

1 The debt secured by the trust deeds is in the amount of \$629,795, according to proofs of claim filed in the
2 case.

3 Thereafter, the Debtors were notified by Marion County that the purchase of the Home Parcel, and its
4 separation from the original 89 acres, created an unlawful lot, as each of the resulting lots was less than the
5 80 acre minimum. The County refused to issue permits for any further improvements on the 17 acres. To
6 rectify their problem, the Debtors purchased the remaining 72.36 acres (hereinafter the “Farm Parcel”) from
7 Updegrave, granting to Updegrave a trust deed securing payment of \$197,498.80.

8 Debtors now seek to avoid Updegrave’s lien on the theory that the conveyance of the Home Parcel
9 created an unlawful lot, which illegality was necessarily cured by the subsequent acquisition of the Farm
10 Parcel. The trust deeds given to Countrywide described the Home Parcel, and further provided that the trust
11 deed included all “appurtenances” to the Home Parcel. Debtors argue that, in light of the 80 acre minimum
12 imposed by the County zoning ordinance, the Farm Parcel is appurtenant to the Home Parcel, and therefore
13 both parcels are subject to the Countrywide trust deeds.² Since the amount secured by the Countrywide liens
14 exceeds the value of both parcels, asserted by Debtors to be \$410,000, it follows that Updegrave’s lien,
15 which is subsequent in time, is not secured by any value to the real property, and may be avoided.

16 Under the Debtors’ reasoning, the Countrywide liens would likely trump other liens secured by an
17 interest in the Farm Parcel, if those interests had been acquired after the Countrywide liens. The Debtors’
18 argument fails, however, because the Farm Parcel is not subject to the Countrywide liens, notwithstanding
19 the language that “appurtenances” are included. An appurtenance is a right or attribute of ownership of a
20 described parcel, such as an easement, a structure or building situated on the property, or water rights.³ The
21 Debtors’ acquisition of the Home Parcel was clearly limited to the 17 acres, as were the trust deeds given to
22 Countrywide. The Countrywide trust deeds cannot be said to have extended to the adjoining parcel owned
23

24 ² The Countrywide trust deeds were subsequently acquired by creditor Bank of America.

25 ³ See e.g., *Turner v. Cole*, 49 P. 971, 31 Or. 154 (1897)(irrigation water rights); *Coventon v. Seufert*,
26 32 P. 508, 23 Or. 548 (1893)(easement).

1 by Updegrave, either at the time of the conveyance of the Home Parcel or by virtue of that parcel's
2 acquisition two years later by the Debtors.

3 CONCLUSION

4 Because the Countrywide liens are limited to the Home Parcel, leaving the Farm Parcel encumbered
5 only by Updegrave's lien, it follows that Updegrave's lien cannot be avoided. An order will be entered by
6 the Court denying the Debtors' motion.

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9 FRANK R. ALLEY, III
10 Chief Bankruptcy Judge