

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: KATHRYN D. LOVATO,

No. 21-10144-j13

Debtor.

**ORDER DENYING DEBTOR'S SECOND MOTION TO STRIKE
MOTION TO VALUE REAL PROPERTY AS DUPLICATIVE AND SETTING FINAL
HEARING ON MOTION TO VALUE**

THIS MATTER is before the Court on the Motion to Strike Motion to Value Real Property as Duplicative (“Second Motion to Strike” – [Doc. 59](#)). Because the Bankruptcy Code does not prohibit a creditor from filing a motion to value and the Court’s local bankruptcy rules contemplate valuation issues be determined at confirmation, the Court will deny the Second Motion to Strike.

BACKGROUND AND PROCEDURAL HISTORY

Debtor filed a voluntary petition under chapter 13 of the Bankruptcy Code on February 9, 2021. Debtor filed a Chapter 13 Plan (“Plan”) on the same date. *See* [Doc. 5](#). Creditor Real Property Financial, PSP (“RPF”) holds a second mortgage on Debtor’s residence (the “Property”). Debtor’s Plan includes a motion to value the Property at \$390,000 and proposes to strip RPF’s mortgage as wholly unsecured based on the value of RPF’s interest in the Property. *See* Plan, Section 3.1. The notice of the deadline to object to confirmation of the Plan fixed a deadline of 21 days from the date of service of the notice on February 9, 2021. *See* [Doc. 6](#). Debtor mailed a copy of the Plan together with the notice of the deadline to object to the Plan to RPF, “c/o Madison Management Services, Attn: Kevin

Cordell – CEO, 4500 Keitzke Ln Ste. B-119, Reno, NV 89501-5033.” *See* [Doc. 7](#).¹ RPF filed an objection to confirmation of Debtor’s Plan on March 10, 2021. *See* Notice of Objection to Chapter 13 Plan (“Plan Objection” - [Doc. 19](#)). On April 1, 2021, RPF filed a Motion to Value Real Property (“Motion to Value” – [Doc. 31](#)). Debtor then filed two motions to strike: one seeking to strike the Plan Objection as untimely filed, and one seeking to strike the Motion to Value, which also argued that RPF failed to timely file an objection to the Plan. *See* Docs. 33 and 35. The Court denied both motions to strike, without prejudice, based on Debtor’s counsel’s failure to comply with the requirements of NM LBR 9013-1(b). *See* Doc. Nos. 57 and 58. Debtor filed the Second Motion to Strike seeking to strike the Motion to Value but has not filed another motion to strike the Plan Objection.

In the meantime, the Court held a final hearing on RPF’s First Amended Motion for Relief from Automatic Stay (“Stay Motion” – [Doc. 40](#)). At that hearing RPF offered into evidence an appraisal of the Property as of the petition date. The appraisal made an “extraordinary assumption” that the Property does not have “KITEC plumbing.” The evidence admitted at the final hearing on the Stay Motion established that the Property does have KITEC plumbing and that KITEC plumbing can have a material adverse effect on a property’s value.

A final hearing on confirmation of Debtor’s Plan is scheduled for July 20, 2021 at 1:30 p.m.

¹ It is not clear whether service of the Plan to RPF in care of its servicer complies with the service requirements of [Fed.R.Bankr.P. 7004](#). *See* [Fed.R.Bankr.P. 7004\(b\)\(3\)](#) (requiring service “[u]pon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . .”). There is no evidence before the Court whether the loan servicer, Madison Management Services, is authorized to accept service on behalf of RPF.

DISCUSSION

In the Second Motion to Strike, Debtor contends that RPF did not timely object to its treatment under the plan, which included a motion to value the Property and strip RPF's mortgage as wholly unsecured, and that, by filing the Motion to Value, RFP is attempting to "get a second bite at the apple." Second Motion to Strike, ¶ 11. Nothing in the Bankruptcy Code prohibits a creditor from filing a motion to value property. In fact, under [11 U.S.C. § 506\(a\)](#),² which governs the determination of the secured amount of a creditor's claim, and [Fed.R.Bankr.P. 3012](#), the Court may determine the amount of a creditor's secured claim "[o]n request by a party in interest." RPF, as the holder of a claim against the bankruptcy estate, is a party in interest. *See In re Davis*, [239 B.R. 573, 579](#) (10th Cir. BAP 1999) (stating that party in interest "is generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings[]" (citation omitted) and applying this definition "to include anyone who has an interest in the property to be administered and distributed under the Chapter 13 plan.").

Despite Debtor's renewed argument that RPF failed to timely object to the Plan, Debtor did not file a second motion to strike the Plan Objection. The Plan Objection remains of record. Under NM LBR 3015-2(d), "[u]nless the Court for good cause orders otherwise, all preconfirmation motions must be included in the plan . . . and not filed separately." The local rule applies only to preconfirmation motions by a debtor because only a debtor may file a chapter 13 plan. *See* [11 U.S.C. § 1321](#) ("The debtor shall file a plan."). In compliance with

² Section 506(a) provides, in relevant part:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

this rule, Debtor included a motion to value the Property in the Plan. The final confirmation hearing is scheduled for July 20, 2021.

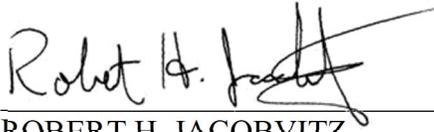
The Court's local rules contemplate that valuation determinations made as a result of preconfirmation motions of the debtor included in the chapter 13 plan will be made at confirmation. NM LBR 3015-2(d) does not preclude a creditor from filing a preconfirmation motion such as a motion to value. As a practical matter, however, if a creditor files a motion raising issues included in the Plan but does not object to the Plan, the creditor risks the preclusive effect of a Plan confirmed by default; or, if the creditor's motion is not filed in time to be heard at the plan confirmation hearing, the creditor risks confirmation of a Plan that renders the creditor's motion moot.

In response to the Motion to Strike, RPF argues the merits of its Motion to Value, and requests the Court to set a separate hearing on the Motion to Value, or, alternatively, decide the Motion to Value based on the Motion to Value and the Debtor's response thereto. *See* Response to Debtor's Second Motion to Strike Motion to Value Real Property as Duplicative ("Response" – [Doc. 63](#)). Although the Debtor raises insufficient grounds to strike the Motion to Value, the Court declines to determine the value of the Property without a hearing. The exhibit attached to the Response purporting to estimate the cost to repair the "Kitec" plumbing has not been admitted into evidence. Further, the evidence presented at prior hearings in this case raises serious questions about the Property's value.

Valuation of the Property has been placed at issue through the Plan and through RPF's separate Motion to Value. RPF's Plan Objection remains of record. Consequently, the Motion to Value should be heard at the same time as Plan confirmation. Both parties will have an opportunity to present evidence of the Property's value at that final hearing.

WHEREFORE, IT IS HEREBY ORDERED that the Motion to Strike is DENIED.

ORDERED FURTHER, that the Court will hold a final hearing on the Motion to Value concurrently with the final hearing on confirmation of the Plan set for July 20, 2021 at 1:30 p.m. in the Gila Courtroom, 5th Floor, Pete V. Domenici United States Courthouse, 333 Lomas Blvd. NW, Albuquerque, New Mexico.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: June 29, 2021

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