

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN**

Cite as: [Unpublished]

**Edward A. Brunner, Debtor**  
Bankruptcy Case No. 03-16262-13

United States Bankruptcy Court  
W.D. Wisconsin, Madison Division

December 15, 2005

Joel Bruce Winnig, Joel Bruce Winnig, S.C., Madison, WI for Debtor

Robert D. Martin, United States Bankruptcy Judge

**MEMORANDUM DECISION**

Edward Brunner filed Chapter 13 bankruptcy in this court on August 25, 2003. Four creditors filed claims secured by the debtor's home. These claims, in order of their lien status, are as follows:

1. Dane County Treasurer: \$11,377.76
2. World Savings: \$145,048.02
3. CUNA: \$11,550.00
4. Sherman Acquisitions: \$9,511.86

The debtor filed an objection to Sherman's claim, stating that the value of liens that prime Sherman's exceed the value of the home, therefore, the entire amount of Sherman's mortgage claim is unsecured.

A hearing was held on the debtor's objection to determine whether there was any value remaining in the home after prior liens to which Sherman's lien could attach. At the hearing, the value of the debtor's home was determined to be \$172,000.00 at the time he filed bankruptcy. After subtracting the first three secured claims from the value of the home, there was \$4,024.22 in equity remaining. Therefore, I determined that Sherman was entitled to a secured claim of \$4,024.22 and a general unsecured claim of \$5,487.64.

Sherman filed a "motion to reconsider and amend findings or grant a new trial"

based on its assertion that the equitable doctrine of marshaling of assets should be applied to this case. See Moser Paper Co. v. North Shore Pub. Co., 83 Wis.2d 852 (1978). Since CUNA's claim is also secured by the debtor's automobile, Sherman argues that CUNA should be required to satisfy its debt to the extent possible through the automobile, so to leave more equity in the home to secure Sherman's debt. This would result in a greater secured claim for Sherman.

"Marshaling may be applied where three elements are present: (1) two secured creditors of a common debtor, (2) two or more funds belong to that debtor, and (3) the paramount creditor has the right to resort to either or both funds, while the junior creditor may resort to only one. In addition to showing these elements are present, the party seeking to invoke marshaling also must demonstrate that marshaling would not impose an undue hardship on the senior lienholder." Herzog v. NBD Bank of Highland Park, 203 B.R. 80, 83 (N.D. Ill.1996).

This court will not consider whether marshaling should be applied. A request for marshaling of assets must be brought as an adversary proceeding pursuant to Bankruptcy Rule 7001. See Matter of Feldhahn, 92 B.R. 834, 836 (Bankr. S.D. Iowa 1988), In re El Paso Truck Center, Inc., 129 B.R.109, 113 (Bankr. W.D. Tex.1991). Sherman brought its request for marshaling as a defense to the debtor's objection to claim. Sherman's attempt to argue for marshaling in this manner does not allow a full inquiry into facts relevant to the elements listed above. Nor was the evidence presented at the hearing sufficient to make the necessary findings, if the procedural requirements were ignored.

Sherman's motion for rehearing is denied.

Debtor's separate motion for rehearing is denied as well.