

NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

IN RE:	:	CASE NO. G04-20296-REB
	:	
URSULA A. WOODS,	:	
	:	
Debtor.	:	
	:	
_____	:	
	:	ADVERSARY PROCEEDING
URSULA A. WOODS,	:	NO. 04-2010
	:	
Plaintiff,	:	
	:	
v.	:	CHAPTER 7
	:	
BENEFICIAL MORTGAGE CO. OF GEORGIA,	:	
	:	
Defendant.	:	JUDGE BRIZENDINE
	:	

**ORDER DENYING PLAINTIFF'S REQUEST
FOR ENTRY OF DEFAULT AS AMENDED
AND DISMISSING COMPLAINT**

This matter is before the Court on Plaintiff-Debtor's complaint to determine secured status and avoid lien held by Defendant Beneficial Mortgage Co. of Georgia. In the complaint, Plaintiff argues that even in a case under Chapter 7, the lien should be avoided under 11 U.S.C. § 506(a) and (d) because there is no value to support the lien and the underlying debt is wholly unsecured. Further, Plaintiff contends Defendant's lien should be avoided on grounds that the deed to secure debt held by a prior lender prohibited further encumbrances on the underlying property. Procedurally, Plaintiff filed a request for entry of default on April 14, 2004. Plaintiff amended the request on April 16, 2004 repeating the phrase from Fed.R.Civ.P. 55(b), applicable herein by

Fed.R.Bankr.P. 7055, that Plaintiff's "claims are for a sum certain, or for a sum which by computation can be made certain." Plaintiff also filed a second amendment to request for default on May 10, 2004 to amend the name of the party defendant. Defendant has not filed an answer or otherwise responded to the complaint or Plaintiff's request for default.

The purpose of the default provision whereby a party first requests the clerk to enter a default under (b)(1) and then seeks entry of a default judgment by the court on motion under (b)(2), is to furnish the Court with sufficient factual allegations and legal grounds such that a judgment can be entered in favor of the moving party as appropriate – hence the requirement that a specific dollar figure or calculable sum be provided so that the Court does not have to guess what amount(s) the Plaintiff is seeking. In any event, in this case it appears that Plaintiff is not seeking a money judgment, but rather is seeking declaratory relief in the form of avoidance of Defendant's allegedly wholly unsecured lien. At a status conference held on May 6, 2004, the Court allowed Plaintiff the opportunity to file a brief in support of entry of a default judgment which Plaintiff did file on May 13, 2004. Upon review of the argument and authority cited therein, the Court concludes that default judgment on the requested relief may not be entered in favor of Plaintiff-Debtor.¹

Plaintiff argues that this Court has the authority to avoid or 'strip off' a wholly unsecured junior mortgage unsupported by any equity in the underlying property in a case under Chapter 7 consistent with the ruling and logic of *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). Plaintiff asserts that *Dewsnup* only prohibits the avoidance of undersecured or

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Ordinarily, the Clerk enters a default or other appropriate notice regarding such requests, but given the current posture of this matter even though Plaintiff is not proceeding by motion, the Court will enter a dispositive, final order on the default request as filed as well as dismissing the complaint itself on the Court's own motion.

partially secured liens in Chapter 7 cases but does not disallow the avoidance of liens that are totally unsecured. Specifically, Plaintiff contends that under 11 U.S.C. § 506(a), a wholly unsecured lien is not an allowed secured claim, and thus the lien is void under subsection 506(d) and can be ‘stripped off’ or avoided in its entirety.² In *Dewsnup*, the United States Supreme Court determined that an unsecured portion of a partially secured lien is not subject to avoidance and cannot be ‘stripped down’ to the value of the collateral under subsection 506(d) because the claim secured by the lien is fully allowed under subsection 502, and liens historically pass through bankruptcy unaffected. 112 S.Ct. at 778. The Court did not address, Plaintiff claims, the issue of whether a Chapter 7 debtor can completely strip off a lien that is wholly unsecured as presented by the facts in the case at bar. Plaintiff also cites *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993) in support of her case. In that decision, the Supreme Court examined the meaning of an allowed secured claim in the context of an effort to strip down a lien on a principal residence in a case under Chapter 13. Following the determination that the lender held a secured claim, though not fully secured, under subsection 506(a), the Court held that the lien could not be stripped down as same would constitute an impermissible modification of the mortgagee’s rights in violation of subsection 1322(b)(2). 113 S.Ct. at 2109-11. As long as there

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These subsections provide in pertinent part as follows:

(a) 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...

....

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void....

11 U.S.C. § 506(a) & (d).

is some value or equity in the residence to support the lien, the claim cannot be bifurcated into secured and unsecured claims and the lien on the secured claim reduced to the fair market value of the mortgaged property.

From these decisions, Plaintiff asserts, as arguably recognized by the Eleventh Circuit in *Tanner v. First Plus Financial, Inc. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000), that unless there is some value in the property for which a lien to attach, the lien is void under subsection 506(d) and may be stripped off. In *Tanner*, the Eleventh Circuit permitted a Chapter 13 debtor to avoid a wholly unsecured second mortgage, finding that the mortgagee's lien did not qualify as a secured claim under subsection 506(a), and hence that it was void under subsection 506(d).³ Plaintiff argues that based on this authority, there is no principled basis to permit wholly unsecured liens to be avoided in cases under Chapter 13, but not in cases under Chapter 7 as subsection 506(d) applies with equal effectiveness in either chapter. See *Howard v. National Westminster Bank (In re Howard)*, 184 B.R. 644 (Bankr. E.D.N.Y. 1995). Subsection 506(a) remains the initial touchstone for determining the status of a secured claim and where a claim is totally unsecured, there is no lien. 184 B.R. at 647. In *Dewsnup*, a partially secured claim formed the basis of an allowed secured claim. By contrast, in the present case as in *Howard*, the mortgagee holds a wholly unsecured claim and its lien, Plaintiff asserts, is subject to avoidance in Chapter 7 under subsections 506(a) and (d).

Plaintiff cites several bankruptcy decisions supporting this proposition, yet as Plaintiff

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Compare *American General Fin., Inc. v. Dickerson (In re Dickerson)*, 222 F.3d 924 (11th Cir. 2000), *cert. denied*, 532 U.S. 972, 1215 S.Ct. 1604, 149 L.Ed.2d 470 (2001). In that case the Eleventh Circuit panel observed that absent precedent such as *Tanner* and its construal of *Nobleman*, the ruling in *Dickerson* might have been different.

acknowledges the holdings in two of these cases have been overturned by circuit court level authority. *See Ryan v. Homecomings Financial Network (In re Ryan)*, 253 F.3d 778 (4th Cir. 2001) (overruling *Yi v. Citibank (In re Yi)*, 219 B.R. 394 (E.D.Va. 1998)); *see also Talbert v. City Mortgage Services (In re Talbert)*, 344 F.3d 555 (6th Cir. 2003) (declining to follow *Farha v. First American Title Ins. Co. (In re Farha)*, 246 B.R. 547 (Bankr. E.D.Mich. 2000)). Although other bankruptcy courts have permitted lien stripping in Chapter 7 cases (*see e.g. Howard*, 184 B.R. 644; *In re Zempel*, 244 B.R. 625, 629 (Bankr. W.D.Ky. 1999), the majority view disfavors the practice of stripping off allowed unsecured consensual liens in Chapter 7 cases in their entirety as inconsistent with *Dewsnup*. *See e.g. Laskin v. First National Bank of Keystone*, 222 B.R. 872, 876 (B.A.P. 9th Cir. 1998). Under this line of reasoning, the Supreme Court has established the governing statutory interpretation concerning the interplay between subsections 506(a) and (d), concluding that the term “allowed secured claim” in subsection (d) is not exhaustively defined by reference to subsection (a). *Talbert*, 344 F.3d at 558-59; *see also Ryan*, 253 F.3d at 781. To hold otherwise would enact a wholesale change to the fundamental bankruptcy precept that consensual liens remain with the real property in a bankruptcy case as bargained until foreclosure which Congress has yet to alter.

Notwithstanding bankruptcy court decisions that have allowed lien stripping in Chapter 7 cases, absent firmer guidance from the Supreme Court or Congress, and although the Eleventh Circuit has not ruled on this issue in a case under Chapter 7, this Court does not find itself at liberty to grant debtors an additional avoiding power as claimed by Plaintiff herein.⁴ The burden remains

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Moreover, the tone of the Eleventh Circuit’s decision in *Dickerson* further counsels against an extension of lien stripping as urged by Plaintiff herein. 222 F.3d at 926.

on debtors to show why the logic in *Dewsnup* applies differently in cases where debtors are attempting to strip off a wholly unsecured mortgage in its entirety, as opposed to stripping down a partially secured mortgage to the value of the property which the Supreme Court has not permitted in Chapter 7 cases. *Accord Talbert*, 344 F.3d at 560; *Ryan*, 253 F.3d at 782. The court in *Laskin* best summarizes the rationale for not permitting lien stripping in the context of a Chapter 7 case, which is distinguished in its purposes from a Chapter 13 reorganization case, stating as follows:

[W]hether the lien is wholly unsecured or merely undersecured, the reasons articulated by the Supreme Court for its holding in *Dewsnup* [] – that liens pass through bankruptcy unaffected, that mortgagee and mortgagor bargained for a consensual lien which would stay with real property until foreclosure, and that any increase in value of the real property should accrue to the benefit of the creditor, not the debtor or other unsecured creditors – are equally pertinent. Neither *Laskin* nor the courts in *Yi* and *Howard* propound any rationale for distinguishing [them].... Section 506 was intended to facilitate valuation and disposition of property in the reorganization chapters of the Code, not to confer an additional avoiding power on a Chapter 7 debtor.

Ryan, 253 F.3d at 783, quoting *Laskin*, 222 B.R. at 876 (cites omitted). For these reasons, this Court will not grant avoidance relief to Plaintiff as requested under Section 506.

Addressing Plaintiff's remaining contention, the Court finds Plaintiff's claim that Defendant's lien is voidable because Plaintiff was under a legal prohibition from further encumbering her property not well-founded and insufficient to support entry of the relief requested in the complaint. Whether or not Plaintiff may have breached a contractual duty to a prior lender in incurring a further obligation on the subject property with Defendant, such duty does not extend as a legal bar against third parties such as Defendant herein who lend money and obtain a security interest in the underlying property. Any remedies for a breach accrue to the benefit of those in

privity with the original contract or its assignees or in whose favor the provision was intended to run, i.e. the prior lender – not the Plaintiff – and would be enforced thereby in exercise of the rights granted according to the contract. Further, such a proscription may not be used in an offensive manner against a third party such as Defendant to the advantage of the party who in fact caused the alleged breach of the terms of the deed to secure debt.

In sum, based upon the foregoing analysis and citation of authority, the Court concludes that, although Defendant has apparently failed to answer or otherwise respond to Plaintiff-Debtor's complaint, Plaintiff is not entitled to the relief requested by reason of a default. Accepting Plaintiff's factual allegations as stated, the Court concludes Plaintiff has not presented adequate legal grounds to support entry of relief on the claims asserted.

Accordingly, it is

ORDERED that Plaintiff-Debtor's request for entry of default as amended be, and same hereby is, **denied**. Consistent with the above reasoning and conclusions, it is

FURTHER ORDERED that Plaintiff-Debtor's complaint be, and same hereby is, **dismissed**.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff-Debtor, the Defendant, the Chapter 7 Trustee, and the U.S. Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this _____ day of June, 2004.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE