



IT IS ORDERED as set forth below:

Date: May 15, 2012

**W. Homer Drake
U.S. Bankruptcy Court Judge**

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

IN RE:)	CHAPTER 13
)	
MICHAEL DAVID MOORE)	
DENISE CAREY MOORE,)	CASE NO. 11-12198-WHD
)	
DEBTORS.)	
)	
MICHAEL DAVID MOORE)	
DENISE CAREY MOORE,)	
)	
PLAINTIFFS)	
)	
-vs-)	ADVERSARY PROCEEDING
)	No. 11-01051
DELTA COMMUNITY CREDIT UNION,)	
)	
DEFENDANT.)	

ORDER

Before the Court is the Complaint to Determine Value of Property, filed by Michael and Denise Moore (hereinafter the "Plaintiffs") against Delta Community Credit Union

(hereinafter the "Defendant"). Following an evidentiary hearing held on April 5, 2012, the Court took the Complaint under advisement. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. §§ 157(b)(2)(K), 1334.

FACTS AND PROCEDURAL HISTORY

On June 30, 2011, the Plaintiffs filed a joint voluntary petition under chapter 13 of the Bankruptcy. Thereafter, pursuant to section 506(a) and Rule 3012, the Plaintiffs filed a complaint to value their principal residence, which is commonly known as 102 Edens Edge, Peachtree City, Georgia (hereinafter the "Property").

The Defendant holds a second priority lien on the Property, which secures a debt in the amount of \$93,659. The Property is also subject to the Defendant's first priority deed to secure debt, upon which is owed \$266,746.29.¹ On September 13, 2011, the Plaintiffs filed their Second Amended Plan, in which they propose to treat the Defendant's claim as wholly unsecured. The Complaint seeks a determination that the Property is worth \$260,000 and, accordingly, that the Defendant's second priority lien is void. The Defendant objects, asserting the value of the Property is \$320,000.

The Property is a single-family home located in Peachtree City, Georgia. The Plaintiffs purchased the Property in 2004 for \$339,000 and have since improved the Property by adding a saltwater pool, granite counter tops, and two porches.

CONCLUSIONS OF LAW

¹ As stated in Creditor's Proof of Claim, #6-1.

The issue before the Court is whether the lien arising from the Defendant's second mortgage can be removed or stripped from the Property under sections 506 and 1322(b) of the Code. Section 506(a) provides that a claim is secured to the extent of the value of the creditor's interest in the estate's interest in the property and unsecured to the extent that the creditor's claim exceeds the value of the estate's interest in the property. *See* 11 U.S.C. § 506(a). Section 1322(b)(2) allows a debtor, through the chapter 13 plan, to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2). In *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000), the Eleventh Circuit Court of Appeals held that chapter 13 debtors can modify the rights of junior mortgage holders, even those on a principle residence, if the second mortgage is completely unsecured. *See In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

To determine if a creditor's claim is completely unsecured, a court must determine whether the value of the estate's interest in the property at the date of the petition is greater than or less than the amount of the claim held by the first priority secured lender. *See In re Flores*, 2012 WL 124973 (Bankr. N.D. Cal. 2012) (citing *In re Serda*, 395 B.R. 450 (Bankr. E.D. Cal. 2008)); *In re Sarno*, 463 B.R. 163 (Bankr. D. Mass. 2011) (holding that "the proper date for determining the value of the debtors' home and whether [second lien holder's] claim is secured by that home is the petition date"); *Johnson v. GMAC (In re Johnson)*, 165 B.R. 524 (Bankr. S.D. Ga. 1994). *But see In re Landry*, 462 B.R. 317 (Bankr. D. Mass. 2011). This "value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property" 11 U.S.C. §

506(a)(1). "When the debtors intend to stay in their house, the proper valuation of the house under Bankruptcy Code section 506(a) is the fair market value," which is "the price which a willing seller under no compulsion to sell and a willing buyer under no compulsion to buy would agree upon after the property has been exposed to the market for a reasonable time." *Flores*, 2012 WL 124973 at *4 (quoting *Taffi v. United States of America (In re Taffi)*, 96 F.3d 1190, 1192 (9th Cir.1996)).

The evidence before the Court as to the value of the Property consists of written appraisals, a real estate agent's market analysis, the tax assessor's value, the testimony of expert witnesses² regarding the written appraisals and the market analysis, and the lay opinion testimony of Denise Moore, the owner of the Property. For the Plaintiffs, Wade Gaddy, a real estate appraiser, and Deborah Pitts, a real estate agent, both valued the residence at \$260,000. Plaintiff Denise Moore also testified about the value ascribed to the Property by the tax assessors office. Gaddy's testimony was based on the appraisal he prepared on June 6, 2011. *See* Plaintiffs' Exhibit 1. Ms. Moore's testimony as to the tax assessed value was based on a Fayette County Property Card and the Property Tax Statements from the previous seven years. *See* Plaintiffs' Exhibits 2 and 3. Deborah Pitts testified regarding a market analysis she conducted for Plaintiffs. *See* Plaintiffs' Exhibit 5.³

Gaddy works for Gaddy & Company, LLC, an appraisal company he has owned since 1996. In preparing his appraisal, he used a tape measure to obtain the square footage

² The parties stipulated to the ability of the witnesses to testify as expert witnesses and to the admissibility of the appraisals, market analysis, and tax statements.

³ The Plaintiffs did not proffer an Exhibit 4 for admission.

of the home and utilized the sales comparison approach in determining the value. Under this approach, Gaddy first identified the relevant market in order to find recently sold houses that are comparable to the Plaintiffs' house. As his initial search resulted in only one relevant sale, Gaddy expanded his search to include the elementary school district within which the Property is located. The expanded search resulted in four additional comparable sales, for a total of five comparable sales within the prior year, ranging in distances of between 0.77 to 1.96 miles from the Property.

The most recent tax statement values the Property at \$286,300, showing a decline from a high of \$306,600 in 2008 and 2009. However, the Plaintiffs appealed the value, and the county tax assessor granted the appeal, lowering the Property's value to \$260,000. Moore also testified that, from October 18, 2011 to April 18, 2011, the Plaintiffs listed the Property for sale at a price of \$389,000. The Plaintiffs set this price based solely on the amount remaining on the two mortgages.

Deborah Pitts has been a real estate agent for thirteen years and currently works for Drake Realty. On January 24, 2011, she performed a market analysis of the Property in which she included four houses listed for sale at that time and five houses that had been sold in the previous six months. The properties listed for sale ranged in value from \$259,000 to \$269,900, and the sold properties ranged in value from \$242,000 to \$299,000. Pitts testified that she found the nine properties by looking in the Property's school district and then by selecting properties with similar characteristics to those of the Property. According to the Market Analysis, seven of the properties are in the same elementary school district as the Property and all nine are in the same general school district as the Property.

For the Defendant, Phil Duncan, a real estate appraiser for forty years and twenty-year owner of Appraisal Services, testified as to the appraisal he prepared, which valued the Property at \$320,000. He used the sales comparison approach and selected comparable sales from sales of homes within the same school district as the Property. Comparable Number 1, which was located within the same neighborhood as the Property, sold for \$355,500, while the other comparable sales ranged from \$265,000 to \$342,500.

Both appraisers testified as to the differences in the two appraisals. According to Duncan, the main differences between his appraisal and Gaddy's appraisal were the square footage used and the method for determining the comparable sales. Duncan calculated value based on 2,924 square feet of living space, while Gaddy used 2,745 square feet. The Fayette County Tax Assessors Office also listed the Property as having 2,743 square feet. *See Plaintiff's Exhibit 2, Fayette County Property Card.*

The parties presented widely differing testimony with a large disparity in the appraised values. The Plaintiffs value the Property at \$260,000, as evidenced by an appraisal, the appraiser's testimony, an owner's testimony, the tax appraisal, a market analysis, and the testimony of the real estate agent who performed the market analysis. The Defendants value the Property at \$320,000, as evidenced by an appraisal and the appraiser's testimony.

The opposing evidence is not easily distinguishable. Both appraisals and the market analysis used homes that were sufficiently similar to the Property. Although the Plaintiffs' appraisal was completed nearer the petition date, on June 6, 2011, rather than October 28, 2011, the comparable sales used by the Defendant's appraiser occurred much closer to the

petition date, and, therefore are a better indicator of the value of those homes on the petition date than the sales used by the Plaintiffs' appraiser. *See In re Sarno*, 463 B.R. 163 (Bankr. D. Mass. 2011). On the other hand, the homes relied upon by Pitts in her market analysis were all sold within four months of the petition date.⁴

In viewing the evidence as a whole, the Court values the Property at \$260,000. The homes listed in the Plaintiffs' appraisal are simply more comparable to the Property. For example, these homes are ranch-style homes, like the Property, while the Defendant's appraisal included four homes that have either one and a half or two stories. Further, the Property does not have a finished basement, and the Plaintiffs' appraisal included only two homes with finished basements.

While the Defendant's appraiser faulted the method of determining comparable sales used by the Plaintiffs' appraiser, the general appearance and characteristics of the homes in the Plaintiffs' appraisal are much nearer the appearance and characteristics of the Property. The Plaintiffs' appraisal is further supported by the Market Analysis, which provides additional sales of comparable homes, indicating that the Plaintiffs' value of the Property is correct. Although the square footage listed in the Defendant's appraisal would increase the value of the Plaintiffs' Appraisal if correct, the Court relies on the square footage in the Plaintiffs' Appraisal as corroborated by the Fayette County Property Card. Therefore, the Court finds for the Plaintiffs and values the Property at \$260,000.

CONCLUSION

⁴ The Market Analysis was completed on January 24, 2011 over 6 months after the petition date. Thus, the Court has not considered any home that was listed for sale in the Market Analysis, but did not sell.

For the reasons stated above, the Court finds that the fair market value, as of the petition date of the Plaintiff's bankruptcy case, of real property commonly known as 102 Edens Edge, Peachtree City, Georgia is \$260,000.

IT IS FURTHER ORDERED that, for purposes of the Plaintiffs' chapter 13 case, any claim filed by or on behalf of Delta Community Credit Union for an amount previously secured by the second priority lien shall be allowed as a general unsecured claim.

IT IS FURTHER ORDERED that the lien on 102 Edens Edge, Peachtree City, held by Delta Community Credit Union on October 3, 2007 at Book 3305, Pages 292-97 of the official records of Fayette County, Georgia, shall be deemed void with respect to the Plaintiffs' interest in the Property and shall be extinguished automatically, without further court order, upon entry of the Plaintiffs' discharge in the related chapter 13 case. In the event the Plaintiffs' case is dismissed or converted, the lien of Delta Community Credit Union shall not be affected by this Order in accordance with 11 U.S.C. § 349(b)(1)(C) or § 348(f)(1)(B), as applicable.

The Clerk is directed to serve a copy of this Order on the Plaintiffs, counsel for the Plaintiffs, the Defendant, counsel for the Defendant, and the Chapter 13 Trustee.

END OF DOCUMENT