

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

IN RE:	:	CASE NO. G08-23720-REB
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BOBBY McCARTER and JOAN McCARTER,	:	
	:	
Debtors.	:	
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	:	CONTESTED MATTER
BOBBY McCARTER and JOAN McCARTER,	:	
	:	
Movants,	:	
	:	
v.	:	CHAPTER 13
	:	
GREEN TREE SERVICING, LLC	:	
As Authorized Servicer for Lake County	:	
Mortgage Loan Trust 2005-HEI,	:	
	:	
Respondent.	:	JUDGE BRIZENDINE
	:	

**ORDER**

Before the Court is the motion of Debtor-Movants filed on November 7, 2013 pursuant to 11 U.S.C. § 506(a) and Federal Rule of Bankruptcy Procedure 3012 to avoid the lien of Respondent Green Tree Servicing, LLC, and to determine the value of its security and its allowed secured claim (Docket Entry No. 138). In the motion, Debtors allege that the value of certain residential real property in which Respondent holds a second-priority security interest was actually less than the amount of the first-priority interest on said property as of the petition filing date herein. Thus, Respondent's second position lien is wholly unsecured and should be stripped off under 11 U.S.C. § 506(d) upon entry of the order of discharge. In addition, they ask that the Chapter 13 Trustee be directed to treat Respondent's claim as

an unsecured claim under the plan.<sup>1</sup>

While Respondent initially opposed the motion, it subsequently withdrew its response. The Chapter 13 Trustee, however, filed a separate objection to the requested relief (Docket Entry No. 148). This matter came on for hearing on December 18, 2013, and at the Court's direction, the parties have submitted briefs on the issue presented. Based on the following discussion, the Court concludes that the motion should be denied.

Respondent holds two claims in this case as a result of two separate mortgages on the Debtors' residential real property located at 181 Avon Street, Toccoa, Georgia 30577, for which Debtors listed a value in their bankruptcy schedules of \$100,000.00, as later amended to \$110,000.00. As asserted through its proof of claim as amended, Respondent holds a first priority mortgage interest amounting to \$88,038.78, plus an arrearage of \$9,248.13. In addition, Respondent also holds a second priority mortgage interest on this property in the amount of \$19,091.58, plus an arrearage as later increased to \$2,368.68. No objections were filed against these claims. In their plan as confirmed by the Court, Debtors proposed to treat both claims as secured, making regular monthly payments to this lender with the arrearages to be cured through payments under the plan. *See* Third Amended Chapter 13 Plan, filed on August 4, 2009 (Docket Entry No. 55); *see also* Order Confirming Plan, entered on September 15, 2009 (Docket Entry No. 63).

Relying upon a recently acquired appraisal dated July 20, 2013 valuing the subject property retroactively as of the petition filing date through the present day, Debtors now contend that the fair market value of the subject property is only \$55,000.00. Thus, there is no value to which Respondent's

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<sup>1</sup> Debtors filed a post-confirmation modification of their Chapter 13 plan proposing to treat Respondent's claim as an unsecured claim on January 10, 2014. *See* Docket Entry No. 150.

second priority lien can attach and same should be avoided and the underlying claim allowed only as a general unsecured claim. Debtors assert that they should be permitted to avoid Respondent's lien and modify their confirmed plan due to this revised valuation of Respondent's collateral.<sup>2</sup> Under Section 1329(a), there is no time limitation for a post-confirmation modification, and the modification as proposed would reduce the amount paid on Respondent's second priority claim as permitted by that provision, while also bringing the plan in line with the requirement of Section 1325(a)(5)(B)(ii).

The Trustee counters that because the Court has already confirmed Debtors' plan, its terms are binding on all parties and may not be modified. Issues determined in the plan, such as the proposed treatment of Respondent's second priority claim based upon a certain value of the underlying property, cannot be subjected to further litigation. Further, while Section 1329 allows certain post-confirmation modifications such as the payment structure in relation to a claim, it does not allow the reclassification of a claim as proposed by Debtors.

Under Section 1327(a), the confirmation of a Chapter 13 plan binds all parties who are treated by the plan, and is in essence an adjudication over all issues pertaining to the classification and treatment of claims. As such, upon confirmation, the value of a secured claim is fixed. The plan as confirmed is accorded the effect of *res judicata*, barring litigation over any matters that were or could have been asserted before confirmation. See *Berrouet v. BAC Home Loan Servicing (In re Berrouet)*, 469 B.R. 393, 396-97 (Bankr. N.D.Ga. 2012), citing *In re Rutt*, 457 B.R. 97, 100-01 (Bankr. D.Colo. 2010); *In re Cruz*, 253 B.R. 638, 641 (Bankr. D.N.J. 2000). In treating a claim as secured based on a valuation of the underlying property and an existing mortgage balance, a confirmed plan may not be modified even when

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<sup>2</sup> Along with their proposed post-confirmation modification to plan, Debtors amended their bankruptcy schedules on January 10, 2014 reducing the value of the property and moving the subject claim to the unsecured category. See Docket Entry Nos. 150 & 152.

there is a change in the present value of that property. See *In re Taylor*, 2011 WL 7070518, 2011 Bankr. LEXIS 5244 (Bankr. N.D.Ga. Dec. 7, 2011); see also *In re Nolan*, 232 F.3d 528 (6<sup>th</sup> Cir. 2000).

Debtors do not seek relief on the basis of a change in the present value of their property, but argue that their new appraisal effectively demonstrates that the value originally assigned to same in their schedules was incorrect. Yet, they do not offer an explanation for the basis of this prior valuation and how it doubled what they now believe was the true fair market value of the property in 2008.<sup>3</sup> In any event, the Court concludes that it does not have the authority to permit Debtors to modify their plan and reclassify Respondent's claim almost five years following confirmation.

In confirming a plan, the Court must rely on the valuation as presented unless challenged and adjudicated at that time. In this circuit, debtors can strip off certain second mortgage liens under the authority of *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357 (11<sup>th</sup> Cir. 2000). Section 1322(b)(2), however, protects such liens when there is evidence of existing equity in a debtor's principal residence. Such were the facts on which this Court confirmed Debtors' plan, including its treatment of Respondent's second priority claim as secured. Absent a compelling reason that outweighs the strong interest in the finality of a confirmation order, such as addressing a failure to afford due process, which has not been argued, the Court concludes that Debtors may not at this late date modify said treatment through newly obtained evidence seeking to place the question of value in issue.<sup>4</sup>

Accordingly, based on the above discussion, it is

**ORDERED** that the Motion of Debtors to Avoid Liens and Determine Value of Security and

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<sup>3</sup> Debtors even amended Schedule A on March 3, 2009 increasing the value of the property to \$110,000.00.

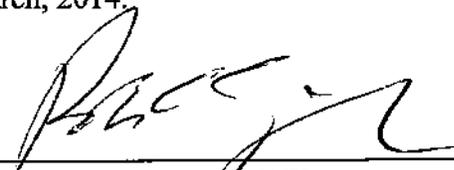
<sup>4</sup> See generally *Pees v. CitiMortgage, Inc. (In re Crum)*, 479 B.R. 734, 741 (Bankr. S.D.Ohio 2012).

Creditor's Allowed Secured Claim (Docket Entry No. 138) be, and the same hereby is, **denied**; and, therefore, Debtors' proposed modification of plan (Docket Entry No. 150) be, and the same hereby is, also **denied**.

The Clerk is directed to serve a copy of this Order upon Debtors, counsel for Debtors, counsel for Respondent, and the Chapter 13 Trustee.

**IT IS SO ORDERED.**

At Atlanta, Georgia this 6<sup>th</sup> day of March, 2014.

  
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ROBERT E. BRIZENDINE  
UNITED STATES BANKRUPTCY JUDGE