

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

RETURNED ON DOCUMENT
6-14-05

IN THE MATTER OF:	:	CASE NUMBER: R03-51153-PWB
	:	
TIMOTHY MARK ARNOLD	:	
and JANET L. ARNOLD,	:	
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtors.	:	BANKRUPTCY CODE
	:	
	:	
TIMOTHY MARK ARNOLD	:	
and JANET L. ARNOLD,	:	
	:	
	:	ADVERSARY PROCEEDING
Plaintiffs	:	NO. 05-4001
	:	
	:	
v.	:	
	:	
BENEFICIAL MORTGAGE CO.	:	JUDGE BONAPFEL
OF AMERICA,	:	
	:	
	:	
Defendant.	:	

ORDER ON DEBTORS' MOTION FOR DEFAULT JUDGMENT

Debtors seek a determination that a third priority deed to secure debt held by Beneficial Mortgage Co. of America ("Beneficial") and secured by the Debtors' residence located at 157 Iron Hill Road, Taylorsville, Georgia, is wholly unsecured and, therefore, void. For the reasons stated herein, Debtors' motion for default judgment is set for hearing so that the Debtors may present evidence and legal argument in support of their position.

Section 506(a) provides that "[a]n 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." 11 U.S.C. § 506(a). In the instant case it is necessary to read Section 506(a) in conjunction with

Section 1322(b)(2). Section 1322(b)(2) permits a Chapter 13 debtor's 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).

The Eleventh Circuit has held that a creditor whose lien is wholly unsecured under § 506(a) does not have a secured claim and, therefore, is not entitled to the protection of § 1322(b)(2) even if the creditor has a lien on the debtor's residence and no other collateral. *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000); *see also In re Dickerson*, 222 F.3d 924 (11th Cir. 2000), *cert. denied sub nom. American General Finance, Inc. v. Dickerson*, 523 U.S. 972 (2001) (recognizing prior precedent set by Circuit in *Tanner*).

Debtor's residence is encumbered by three deeds to secure debt. Household Financial Services, Inc., holds a first deed to secure debt in the amount of \$45,362.83, according to its proof of claim filed October 22, 2003. Debtors' schedules and the complaint reflect that Citifinancial Mortgage holds a second deed to secure debt in the amount of \$13,000. Beneficial holds a third deed to secure debt in the amount of \$17,555.87 as reflected in its proof of claim. Debtors contend that there is no value in the residence for Beneficial's third priority lien to attach and, therefore, that Beneficial's claim is unsecured and the lien is void pursuant to § 506(d) and § 1322(b)(2). Thus, in order to determine whether Beneficial's lien is "wholly unsecured," the Court must determine the value of the residence. *See Tanner*, 217 F.3d at 1359 (reading sections 506(a) and 133(b)(2) in concert "first requires bankruptcy courts to determine the value of the homestead lender's secured claim under section 506(a)").

Debtors contend in their complaint filed January 18, 2005, that the value of the residence is \$51,400 pursuant to an appraisal, but the appraisal report is not attached and there is no indication when such appraisal was performed. In contrast, Debtors' schedules filed sixteen

months earlier on September 18, 2003, reflect a value of \$64,000 for the residence. If the value of Debtors' residence is \$64,000, there is equity to which Beneficial's lien may attach and, therefore, its lien would not be wholly unsecured and would not be avoidable under § 506 and § 1322(b)(2).¹ See *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993).

Section 506(a) provides that "value shall be determined in light of the purpose of the valuation and of the proposed disposition of use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." Thus, the time for determining valuation may differ in a case depending on the purpose of the valuation such as determinations of adequate protection, secured status, or sale of property. Neither 506(a) nor 1322(b)(2) identify when value is established for purposes of determining whether a lien may be stripped off under 1322(b)(2).

In order to determine the value of the residence and in order to determine whether entry of default judgment is appropriate, the Court shall schedule this motion for hearing. Specifically, the Court directs the Debtors to be prepared to address the following issues:

1. What is the appropriate date for valuation of the residence for purposes of valuation under § 506(a) and § 1322(b)(2)?
2. Are Debtors bound by the value of \$64,000 listed in their schedules pursuant to the principles of res judicata or judicial estoppel?

¹Debtor's plan filed September 18, 2003, provides that "Debtors propose to fund the wholly unsecured 3rd Mortgage owed to Beneficial through the plan as a general unsecured debt. This debt is wholly unsecured, as the value of the collateral is less than the total owed to the two superior lienholders." However, Debtors' contention that "the value of the collateral is less than the total owed to the two superior lienholders" is contrary to the value and claim amounts listed on Schedules A and D filed contemporaneously with the Plan. In any event, a plan provision to fund a claim as an unsecured claim is not effective to "strip off" a lien which must be done by adversary proceeding. See FED. R. BANKR. P. 7001(2); see also *In re Bateman*, 331 F.3d 821 (11th Cir. 2000).

3. What is the evidentiary basis for the \$51,400 value listed in the complaint and the basis for the \$12,600 depreciation of the residence in approximately 16 months?

Accordingly, it is

ORDERED AND NOTICE IS HEREBY GIVEN that a hearing on Debtors' motion for default judgment shall be held on **July 20, 2005**, at **11:30 a.m.** in Courtroom 326, United States Courthouse, 600 East First Street, Rome, Georgia.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Rome, Georgia, this 13 day of June, 2005.



PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE

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