IT IS ORDERED as set forth below:

Date: April 09, 2010

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: A09-78173-PWB
LORRAINE MCNEAL,	:	
Debtor.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
LORRAINE MCNEAL,	:	
Movant	:	
v.	:	
GMAC MORTGAGE COMPANY and HOMECOMINGS FINANCIAL, LLC, A GMAC COMPANY,	:	
Respondent.	:	

ORDER DENYING DEBTOR'S MOTION TO DETERMINE SECURED STATUS OF CLAIM

The Debtor in this chapter 7 case seeks a determination that the second priority deed to

secure debt on her residence located at 4486 Northwind Drive, Ellenwood, Georgia, held by the Respondents[1] is completely unsecured and that, because there is no value in the residence to which the junior lien can attach, the Respondents' claim is wholly unsecured and the lien is void pursuant to 11 U.S.C. § 506(d).

The Debtor alleges that HSBC holds a first priority mortgage on the residence in the amount of $176,413. The Debtor alleges values ranging from $130,795 to $151,889. Thus, using the valuations provided by the Debtor, there is no equity in the residence to which the Respondents' lien for its $44,444 debt may attach. Respondents have not filed a proof of claim in the case.

The Debtor posits that §§ 506(a) and (d) dictate that, because there is no value whatsoever in the residence to support Respondents' lien, Respondents hold only an unsecured claim and the lien is void and may be "stripped off."

The Respondents have not filed a response controverting the Debtors' allegations. As a result, the factual assertions are deemed admitted. FED. R. CIV. P. 8(b)(6). Nevertheless, the Court must determine whether the relief requested by the Debtor asserts a legal claim upon which relief may be granted -- *i.e.*, whether a chapter 7 debtor may avoid a wholly unsecured lien pursuant to 11 U.S.C. § 506(a) and (d). For the reasons stated herein, the Debtor's motion is denied.[2]

The relief sought by the Debtor is premised on the interplay between subsections (a) and

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[1]The Debtor's motion refers to both Respondents as holding a second priority lien. There is no documentation attached to the motion evidencing the record lien holders on the residence and, as a result, the Court is unable to determine who is the proper entity for purposes of the relief requested. For purposes of the motion, the Court assumes that the Debtor has named GMAC Mortgage Company because it is a parent company of Homecomings Financial.

[2]This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334.

(d) of 11 U.S.C. § 506. Section 506(a)(1) provides, "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 . . . 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." Section 506(d) provides, "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void" unless either the "claim was disallowed only under section 502(b)(5) or 502(e)" or "such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title."

In *Dewsnup v. Timm*, 502 U.S. 410 (1992), the Supreme Court examined the relationship between §§ 506(a) and (d). In *Dewsnup*, the chapter 7 debtor sought to "strip down" an undersecured lien on farmland. The debtor theorized that, because the lienholder's debt exceeded the fair market value of the land, the lienholder had an "allowed secured claim" only to the extent of the value of the collateral under § 506(a), the undersecured portion of the lien was void under § 506(d) because it was not an "allowed secured claim" for purposes of § 506(a).

The Supreme Court rejected this argument and held that § 506(d) does not permit a debtor to "strip down" a creditor's lien to the value of the collateral when the claim is secured by a lien and has been fully allowed pursuant to § 502. The Court reasoned that "allowed secured claim" does not have the same meaning in § 506(d) as in § 506(a) and adopted the United States' argument that, for purposes of § 506(d), "allowed secured claim" is not an "'indivisible term of art' defined by reference to § 506(a)," but instead refers to a claim that is "allowed" and "secured." *Dewsnup*, 502 U.S. at 415-416.

Recognizing the ambiguities in the statutory language, the Supreme Court emphasized

three factors to support its ruling in *Dewsnup*. The Court noted that adopting the debtor's argument would require "freezing" the creditor's secured interest at the time of valuation and that the creditor would lose the benefit of any increase in value at the time of a foreclosure sale, resulting in a potential windfall to a debtor. *Dewsnup*, 502 U.S. at 417. Second, it noted that to permit a debtor to strip down a lien undermines the consensual bargain the debtor and creditor have struck. *Id*. Finally, it observed that it was not likely that Congress intended to depart from the historical principle recognized under the Bankruptcy Act of 1898 and its own previous decisions that a lien on property passes through bankruptcy unaffected. *Dewsnup*, 502 U.S. at 418 (*citing* Section 67d of the 1898 Act, 30 Stat. 544 (1898); *Johnson v. Home State Bank*, 501 U.S. 78 (1991); *Farrey v. Sanderfoot*, 500 U.S. 291(1991); *Long v. Bullard*, 117 U.S. 617 (1886)). The Court concluded that attributing to Congress "the intention to grant a debtor the broad new remedy" to strip down a lien using § 506 "without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles." *Dewsnup*, 502 U.S. at 420.

The vast majority of courts have concluded that *Dewsnup's* reasoning for not permitting a "strip down" of an undersecured lien in chapter 7 applies likewise to a chapter 7 debtor's attempt to "strip off" a wholly unsecured lien. *Talbert v. City Mortgage Services (In re Talbert)*, 344 F.3d 555 (6th Cir. 2003); *Ryan v. Homecomings Fin. Network*, 253 F.3d 778 (4th Cir. 2001); *Laskin v. First Nat. Bank of Keystone (In re Laskin)*, 222 B.R. 872 (B.A.P. 9th Cir. 1998); *In re Caliguri*, 2010 WL 1027411 (Bankr. E.D.N.Y. Mar. 17, 2010); *In re Grano*, 422 B.R. 401 (Bankr. W.D.N.Y. 2010); *In re Arrieta*, 2009 WL 1789576 (Bankr. N.D. Ill. 2009). *Contra*, *In re Lavelle*, 2009 WL 4043089 (Bankr. E.D.N.Y. Nov. 25, 2009); *Howard v. National Westminster Bank, U.S.A. (In re*

Howard), 184 B.R. 644 (Bankr. E.D.N.Y. 1995). These cases rely on one or more of three primary arguments.

First, there is no substantive distinction between a "strip off" and a "strip down" in chapter 7. In *Ryan v. Homecomings Financial Network (In re Ryan)*, 253 F.3d 778 (4th Cir. 2001), the Fourth Circuit observed that the critical issue in *Dewsnup* was the construction of the language of § 506(d) and noted that there was "no principled distinction to be made" between the case of a chapter 7 "strip off" and the chapter 7 "strip down" that *Dewsnup* prohibited. *Ryan*, 253 F.3d at 782. Likewise, in *Talbert v. City Mortgage Services (In re Talbert)*, 344 F.3d 555 (6th Cir. 2003), the Sixth Circuit recognized that to permit a "strip off" would be a departure from pre-Code law that liens on real property pass through bankruptcy and could result in a windfall to a debtor, just as the *Dewsnup* court observed when rejecting a strip down using § 506(d).

Second, *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), neither contradicted nor modified *Dewsnup*. In *Nobelman*, the Supreme Court held § 1322(b)(2) "prohibits a Chapter 13 debtor from relying on § 506(a) to reduce an undersecured homestead mortgage to the fair market value of the mortgaged residence." *Nobelman*, 508 U.S. at 325-326. Recognizing that § 506(a) permits bifurcation of a claim into a secured claim and unsecured claim, the *Nobelman* Court concluded that strip-down was nevertheless impermissible because § 1322(b)(2) prohibits modification of the rights of a holder of a security interest when the lien is secured only by the debtor's principal residence. *Id*. at 332. But, *Nobelman* makes no mention of § 506(d). *See Ryan,* 253 F.3d at 782 ("Indeed, the *Nobelman* Court made no reference to (much less discussed) § 506(d).").

Finally, lien strip-off using § 506(a) and § 506(d) in chapter 7 is impermissible because

§ 506 provides no independent power for a debtor to avoid a lien. *E.g., Laskin v. First Nat'l Bank of Keystone (In re Laskin)*, 222 B.R. 872, 876 (B.A.P. 9th Cir. 1998) ("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."); *In re Virello*, 236 B.R. 199, 204 (Bankr. D.S.C. 1999) ("Absent either a disposition of the putative collateral or valuation of the secured claim for plan confirmation in Chapter 11, 12, or 13, there is simply no basis on which to avoid a lien under § 506(d)."). This concept complements the theory that in a chapter 7 no asset case, where there is no claims allowance process, a lien cannot be avoided under § 506(d). *See* § 506(d)(2) ("such lien is void, unless such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title."). If there are no assets and, thus, no claims adjudication process, including the determination of the extent to which a lienholder has a secured claim, § 506(d) may not be invoked to strip off a wholly unsecured lien. *E.g., In re Caliguri*, 2010 WL 1027411, *3 (Bankr. E.D.N.Y. Mar. 17, 2010); *In re Pomilio*, – B.R.–, 2010 WL 681300, *6 (Bankr. E.D.N.Y. Feb. 23, 2010).

The Court concurs with the reasoning in *Ryan, Talbert*, *Laskin*, and similar cases cited above, and concludes that, based on the holding and reasoning of *Dewsnup*, § 506(d) does not permit the strip off a wholly unsecured lien in a chapter 7 case.[3]

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[3]The Court notes that, unlike *Dewsnup*, the Respondents have not filed a proof of claim in this case. As a result, there is no claim to "allow." Nevertheless, § 506(d) remains inapplicable because it provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void" *unless* "such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title." The filing of a proof of claim (whether by the creditor or by the debtor), however, is an unnecessary exercise. Whether there is a filed claim or not, there is no dispute that Respondents' lien is wholly unsecured. But § 506(d) provides no mechanism in chapter 7 for stripping off such a lien.

Although the Eleventh Circuit has permitted the strip-off of wholly unsecured liens in two cases, neither case permits or supports the relief requested by the Debtor in the present case. The Debtor contends that a pre-*Dewsnup* case, *Folendore v. U.S. Small Business Administration (In re Folendore)*, 862 F.2d 1537 (11th Cir. 1989), has not been overruled and permits the strip-off of a wholly unsecured lien in chapter 7. The Court concludes that *Dewsnup*, not *Folendore*, controls the analysis of the issue.

In *Folendore*, the chapter 7 debtors filed a motion to void the lien of the SBA under § 506. The 1978 Code version of § 506(d) was applicable in *Folendore*, and provided that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void," unless "a party in interest has not requested that the court determine and allow or disallow such claim under section 502 of this title" or "such claim was disallowed only under section 502(e) of this title."

The SBA had filed a proof of claim in the case and the Court noted, thus, that the SBA had an allowed claim. *Folendore*, 862 F.2d at 1538. The issue was whether an unsecured lien supported by an allowed claim is voidable under § 506. The Eleventh Circuit stated that "[t]he parties agree that the SBA does not have an allowed secured claim. Under the plain language of section 506(d), the Folendores may void the lien by making a request to disallow the claim secured by the lien. The claim need not actually be disallowed; the motion for disallowance serves to void the lien." *Folendore*, 862 F.2d at 1538. Thus, prior to *Dewsnup*, the Eleventh Circuit in *Folendore* adopted what it characterized as the "majority view" of bankruptcy courts that § 506(d) may be used to void a lien if the proper request is made under section 502, even if the claim is not disallowed." *Id*. at 1539.

The focus in *Folendore* was, at least in part, on the mechanism for lien-stripping under the 1978 version of § 506. But the distinction between the 1978 version of § 506 at issue in *Folendore* and the 1984 version of § 506 discussed in *Dewsnup* is irrelevant because the ruling in *Dewsnup* abrogates *Folendore*'s analysis of lien-stripping under § 506.[4] The reason is that *Folendore* treats the concept of "allowed secured claim" the same for purposes of § 506(a) and § 506(d), an analysis that *Dewsnup* flatly rejects. Without discussion, *Folendore* states that "the parties agree that the SBA does not have an 'allowed secured claim.'" *Folendore*, 862 F.2d at 1538. It appears that this refers to the "allowed secured claim" for purposes of § 506(a). While this may be true (there was no equity to support the SBA's lien), *Folendore* makes no distinction between the terms "allowed" and "secured" for purposes of § 506(d), as *Dewsnup* requires. *See Dewsnup,* 502 U.S. at 417. ("[Section] 506(d) does not allow petitioner to 'strip down' respondents' lien, because respondents' claim is secured by a lien and has been fully allowed pursuant to § 502."). Thus, continued reliance on *Folendore* is misplaced.[5]

A second Eleventh Circuit lien-stripping case is equally inapplicable. In *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000), the Eleventh Circuit recognized a debtor's right to "strip off" a wholly unsecured lien on a residence in a chapter 13 case. *Tanner* analyzed the interplay between

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[4]The 1984 amendments amended the exceptions in § 506(d)(1) and (2). No change was made to the language at the heart of the issue: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . ." *Cf. Dewsnup*, 502 U.S. at 411 n.1 and *Folendore*, 862 F.2d at 1538.

[5]Courts have recognized (albeit with little discussion) that *Folendore* is no longer controlling on this issue. *See In re* Concannon, 338 B.R. 90, 93 (B.A.P. 9th Cir. 2006); *In re* Swafford, 160 B.R. 246, 249 (Bankr. N.D. Ga. 1993) ("*Dewsnup* effectively overruled *Folendore*"); *In re* Windham, 136 B.R. 878, 882 n.6 (Bankr. M.D. Fla. 1992) (*Dewsnup* "effectively overrules" *Folendore*).

§ 506(a) and § 1322(b)(2), which permit 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." The *Tanner* court 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.

Tanner does not support the strip off of a wholly unsecured lien in chapter 7. Unlike chapter 7, chapter 13, through the applicability of §1322(b)(2), provides a mechanism for the strip-off a wholly unsecured lien. Chapter 7 contains no corresponding provision, and §§ 506(a) and (d) do not provide an independent mechanism for this result. *See In re Grano*, 422 B.R. 401, 403 (Bankr. W.D.N.Y. 2010) (explaining the "unique statutory predicate" of § 1322(b)(2) and that "[n]o parallel provision applies in Chapter 7.").

Although a handful of cases have permitted the strip off of a wholly unsecured lien in a chapter 7 case, these cases have largely been overruled or abrogated by appellate opinions of the Fourth and Sixth Circuits and the Ninth Circuit Bankruptcy Appellate Panel. *See, e.g., Yi v. Citibank (In re Yi)*, 219 B.R. 394 (E.D. Va. 1998) (overruled by *Ryan*); *Farha v. First American Title Ins. (In re Farha)*, 246 B.R. 547 (Bankr. E.D. Mich. 2000) (overruled by *Talbert*); *Zempel v. Household Finance Corp. (In re Zempel)*, 244 B.R. 625 (Bankr. W.D. Ky. 1999) (overruled by *Talbert*). The Court is aware of only two cases that hold that § 506(d) permits the stripping off of a wholly unsecured lien in chapter 7, but, for the reasons stated above, finds their reasoning unpersuasive and declines to adopt this minority position. *See In re Lavelle*, 2009 WL 4043089 (Bankr. E.D.N.Y. Nov. 25, 2009); *Howard v. National Westminster Bank, U.S.A. (In re Howard)*, 184 B.R. 644 (Bankr. E.D.N.Y. 1995).

Conclusion

The Debtor's argument is not without merit and appeal. The policy considerations cited by the Debtor are particularly compelling. Nevertheless, the Court is bound to follow the reasoning of *Dewsnup* and must conclude that §§ 506(a) and (d) do not permit a debtor to strip off a wholly unsecured lien in a chapter 7 case. It is

ORDERED that the Debtor's motion is denied.

End of Order

Distribution List

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Lorraine McNeal
4486 Northwind Drive
Ellenwood, GA 30294

GMAC Mortgage Company
Corporation Service Company
40 Technology Parkway South, Ste. #300
Norcross, GA 30092

GMAC Mortgage, LLC
Corporation Service Company
40 Technology Parkway South, Ste. #300
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Homecomings Financial, LLC
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