



IT IS ORDERED as set forth below:

Date: March 27, 2014

W. Homer Drake
U.S. Bankruptcy Court Judge

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

IN THE MATTER OF:	:	CASE NUMBER
	:	
CHARLES MICHAEL BOUIE, JR.	:	CASE NO. 13-11684-WHD
	:	
Debtor.	:	
	:	
CHARLES MICHAEL BOUIE, JR.	:	CONTESTED MATTER
	:	
Movant.	:	
	:	
-vs-	:	
	:	
NATIONAL PAYMENT RELIEF, LLC,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Respondent.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion to Determine Secured Status of Claim and Release Underlying Liens of Property (hereinafter the "Motion to Strip"), filed by Charles Michael Bouie, Jr. (hereinafter the "Movant") against National Payment Relief, LLC (hereinafter the

"Respondent"). Following an evidentiary hearing held on March 13, 2014, the Court took the Motion to Strip under advisement. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(1), as a core proceeding defined under 28 U.S.C. §§ 157(b)(2)(A) & (K). See also 11 U.S.C. § 1334.

FACTS AND PROCEDURAL HISTORY

On July 1, 2013, the Movant filed a voluntary petition under Chapter 13 of the Bankruptcy Code.¹ Thereafter, pursuant to section 506(a) and (d) and Rule 3012, the Movant filed this Motion to Strip, asking the Court to value his principal residence, which is commonly known as 175 Stillwood Drive, Fayetteville, Georgia 30215 (hereinafter the "Property"), find the junior mortgage lien wholly unsecured, and declare it void.

The Property is a single-family home located in Fayetteville, Georgia. It is located in the Spring Hill Elementary, Bennet Mill Middle, Fayette County High school district. Since its purchase, the Movant improved the Property by installing hardwood floors and by updating the interior painting; however, the Property also shows signs of ordinary wear and tear and some not so ordinary wear and tear.

The Respondent holds a second priority lien on the Property, which secures a debt in the total amount of \$136,935.59, representing \$96,245.67 in principal.² The Property is also subject to the another creditor's first priority deed to secure debt, upon which is owed

¹ 11 U.S.C. § 101 *et. seq.*

² As stated in Respondent's Proof of Claim # 6-1.

\$198,351.91.³ On September 23, 2013, the Movant filed his Amended Chapter 13 Plan, in which he proposes to treat the Respondent's claim as wholly unsecured. The Motion to Strip seeks a determination that the Property's fair market value is worth \$170,000 and, accordingly, that the Respondent's second priority lien is void. The Respondent objects, asserting that the value of the Property is \$215,000 and, accordingly, that the second priority lien should not be stripped.

CONCLUSIONS OF LAW

The issue before the Court is whether the lien arising from the Respondent'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 holding secured liens on a principle residence, if the second mortgage is completely unsecured. See In re Tanner, 217 F.3d 1357 (11th Cir. 2000).

To determine whether a creditor's claim is completely unsecured, a court must

³ As stated in Specialized Loan Servicing LLC's Proof of Claim # 3-1, as amended by # 3-2.

determine whether the value of the estate's interest in the property at the date of the petition⁴ is greater than or less than the amount of the claim held by the first priority secured lender. See Moore v. Delta Cmty. Credit Union (In re Moore), 2012 WL 2870710, at *1 (Bankr. N.D.Ga. 2012) (Drake, B.J.); 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 [a 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 Williams, 480 B.R. 813, 817 (Bankr. E.D.Tenn. 2012); 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 Movant's

⁴ Raised by the Movant as a point of law prior to the presentation of evidence, the Respondent did not contest the relevant valuation date as the petition date.

written appraisal,⁵ the testimony of expert witnesses regarding appraisals conducted by both the Movant and Respondent, and the lay opinion testimony of Charles Michael Bouie, Jr., the owner of the Property. For the Movant, David Baldwin, a real estate appraiser valued the residence at \$170,000. Baldwin's testimony was based on an appraisal he prepared on June 12, 2013, nineteen days before the Movant filed bankruptcy. See Movants' Ex. A. The Movant, Mr. Bouie, also testified about the neighborhood in general and the thoroughness of each of the appraisers.

Baldwin works for Georgia Home Appraisers and has been conducting real-estate appraisals for thirty-eight years. In preparing his appraisal, he spent approximately one and a half to two hours in and around the Property and utilized both the sales comparison approach and cost approach in determining the value. Under the sales comparison approach, Baldwin identified the relevant market in order to find recently sold houses that were comparable to the Movant's house. His search yielded five comparable sales, all located in the same subdivision as the Property. The five comparable sales range in distances of between 0.05 to 0.27 miles from the Property, and all five are located in the same school district as the Property. The actual sales prices of the five comparable sales varied between \$170,000 and \$180,000 and the adjusted sales prices⁶ ranged from \$160,400 to \$178,000. Baldwin's appraisal also contained a market conditions addendum that

⁵ Although Respondent presented, at the hearing, an appraisal to the Court for its review, Respondent failed to request its admittance into evidence.

⁶ In a sales comparison approach, the actual sales price of comparable sales are adjusted to account for the differences between the subject property and the comparable properties.

showed very little fluctuation in the real-estate market over the year prior to Movant's appraisal, but testified that the market has trended upward since last July.

Under the cost comparison approach, Baldwin identified the value of a vacant lot in the Property's subdivision and estimated the cost of building a house identical to the Property as of June 12, 2013. Baldwin testified that the cost approach then attempts to reconcile the costs of building a new house with the actual value of the Property by taking into account such factors as depreciation, lot value, and general market conditions. Based on the cost approach, Baldwin estimated the Property's value as \$170,547.

For the Respondent, Marilyn Watts, a real estate appraiser for thirty-eight years, testified as to the appraisal she prepared on November 25, 2013, which valued the Property at \$215,000. In preparing her appraisal, Watts also utilized a sales comparison approach to determine the value, but spent considerably less time in and around the premises. Watts' sales comparison approach generated two comparable sales from the sale of homes within the subject Property's subdivision and school district and one comparable sale from sale of a home within another subdivision located in another school district. The first two comparable sales, located within the same subdivision as the Property, sold for \$191,000 and \$190,000, respectfully, while the other comparable sale sold for \$220,000. Watts' identified the adjusted sales prices of her three comparable sales as \$203,000, \$214,000, and \$224,000.

Both appraisers testified as to the differences in the two appraisals. According to Watts, the main differences between her appraisal and Baldwin's appraisal were the

square footage used, the adjustment figures for bathrooms, and Baldwin's exclusion of a second fireplace. Additionally, Watts pointed out a couple of smaller errors in Baldwin's appraisal and condemned Baldwin's use of two bank sales, as bank sales are typically sold at less than fair market value. Baldwin criticized the comparable sales used by Watts. In his opinion, there is a large discrepancy in the square footage of Watt's first two comparable sales and the subject Property. Moreover, the most similar comparable, comparable sale number two, sold in November, and both appraisers testified that the market rose between July and November. Lastly, according to Baldwin, Watts overlooked a detached two-car garage with garage apartment in comparable sale number three and failed to account for differences in the neighborhood between comparable sale number three and the Property.

The differences in the square footage in the appraisals derives from different treatment given to an outdoor lofted area on the second floor. Watts testified that such "foyers" are customarily included in local practice and calculated value based on 3,162 square feet of living space, while Baldwin excluded it from living space and used 2,965 square feet.

The parties presented widely differing testimony with a large disparity in the appraised values. The Movant values the Property at \$170,000, as evidenced by an appraisal, the appraiser's testimony, and the owner's testimony. The Respondent values the Property at \$215,000, as evidenced by an appraiser's testimony of her own appraisal.

The opposing evidence is not easily distinguishable. Both appraisals used

sufficiently similar comparable sales to the Property. However, the Movant's appraisal was completed nearer the petition date, on June 12, 2013, rather than November 25, 2013. Moreover, as the Court cannot identify the dates that Baldwin's comparable sales actually closed, the Court has no knowledge of whose comparable sales occurred closer to the petition date and, therefore, better indicate the values of those homes as of the petition date. See In re Sarno, 463 B.R. 163 (Bankr. D. Mass. 2011).

In viewing the evidence as a whole, the Court values the Property at \$190,000. The homes listed in the Movant's appraisal are simply more comparable to the Property. The appraisal, itself, was completed closer in time to the Movant's filing for bankruptcy, giving a better indication of the value of the Property on the petition date. Movant's appraisal consisted of five comparable sales; all but one are closer in square footage to the Property, and all are located in the same subdivision. Conversely, Respondent's appraisal examined three comparable properties, the second of which represents a late November sale, nearly five months after the petition date in a rising real-estate market, and the third of which, given all the testimony, the Court finds to be a poor complement. Moreover, the Court believes that Movant's appraisal appropriately excluded the exterior loft or foyer in the Property. Nonetheless, the Court adjusted accordingly its valuation to account for the Respondent's concerns with the Movant's appraisal, such as the bank sales, proper adjustments for bathrooms, the excluded fireplace, and gave a small concession for the difference in square footage.

While the Respondent's appraiser faulted the method of determining comparable

sales used by the Movant's appraiser, the general appearance and characteristics of the homes in the Movant's appraisal are much nearer the appearance and characteristics of the Property. Therefore, the Court ultimately finds for the Movant by valuing the Property at \$190,000.

Conclusion

For the reasons stated above, the Court finds that the fair market value, as of the petition date of the Movant's bankruptcy case, of real property commonly known as 175 Stillwood Drive, Fayetteville, Georgia is \$190,000, which does not exceed the first priority lien.

IT IS **ORDERED** that, for purposes of the Movant's Chapter 13 case, any claim filed by or on behalf of National Payment Relief, LLC 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 175 Stillwood Drive, Fayetteville, Georgia 30215 held by National Payment Relief, LLC as recorded on December 8, 2006 at Book 3144, Pages 233-44 of the official records of Fayette County, Georgia, shall be deemed void with respect to the Movant's interest in the Property and shall be extinguished automatically, without further court order, upon entry of the Movant's discharge in the related Chapter 13 case. In the event the Movant's case is dismissed or converted, the lien of National Payment Relief, LLC 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 Movant, the

Respondent, respective counsel, and the Chapter 13 Trustee.

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