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WRITTEN DECISION - NOT FOR PUBLICATION

ENTERED _____ FILED
JUN 10 2009
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: } BK. No. 08-12995-LA13
Mark Alan Robertson and Melody Gaye }
Robertson } MEMORANDUM DECISION
Debtors. }

Debtors Mark Alan Robertson and Melody Gaye Robertson (collectively, "Debtors") filed a Motion for Valuation of Debtors' Residence and Avoidance of 2nd Trust Deed Thereon (the "Lien Strip Motion"). Debtors allege in the Lien Strip Motion that the value of their residence is less than the amount owed to the first trust deed holder and request that this Court confirm this valuation pursuant to Federal Rule of Bankruptcy Procedure 3012. As a result, they also seek to strip the second trust deed held by Wells Fargo Bank ("Lender") under 11 U.S.C. § 1322(b)(2).¹ Lender disputes Debtors' valuation, alleges that

¹ Hereinafter references to code sections refer to Title 11 of the United States Code, also referred to as the "Bankruptcy Code" unless otherwise specified. References to Rule refer to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated.

1 it holds an undersecured rather than unsecured claim, and argues that, as a result, Debtors
2 cannot strip or otherwise modify its trust deed.

3 The Court held a valuation hearing on April 29, 2009 (the "Valuation Hearing"). At
4 that time, the Court heard testimony from Ms. Robertson and from two valuation experts.
5 The Court has carefully reviewed the evidence contained in the written valuation reports and
6 the testimony at the Valuation Hearing. The Court now renders its decision.

7 **Facts**

8 1. Debtors filed a Voluntary Chapter 13 Petition on December 18, 2008 (the
9 "Petition Date").

10 2. Their concurrently filed Schedule A values their single family home located at
11 18181 Verano Drive, San Diego, California (the "Residence") at \$495,000.00. There is no
12 dispute that the Residence is Debtors' principal residence within the meaning of
13 section 1322(b)(2). Debtors' schedules also list a claim secured by a first trust deed against
14 the Residence in the amount of \$502,837.07 and Lender's claim secured by a second trust
15 deed against the Residence in the amount of \$174,399.14.

16 3. Debtors also filed a chapter 13 Plan (the "Plan") on the Petition Date. The
17 Plan provided for monthly payments of \$1,950.00 and payment of a pro rata share of
18 \$82,252.20 to unsecured creditors. In addition, at paragraph 19, the Plan provided that:
19 "Debtors will file a motion to avoid the second mortgage lien on their real property, held by
20 Wells Fargo, as it is wholly unsecured. The status of the lien held by Wells Fargo will be
21 determined before confirmation of the plan, and Wells Fargo will be bound by the terms of
22 the confirmed plan."

23 4. Consistent with the Plan, on December 23, 2008, the Debtors filed the Lien
24 Strip Motion and set this matter for hearing on February 24, 2009.

25 5. Debtors supported the Lien Strip Motion with the Debtors' Declaration and
26 exhibits attached thereto, one of which was the Broker's Opinion of Value by James Brad
27 Butner dated October 21, 2008 (the "Butner Opinion"). Mr. Butner is a real estate broker
28 licensed in the State of California.

1 6. The Butner Opinion was admitted into evidence at the Valuation Hearing.
2 Mr. Butner performed his analysis on or about October 21, 2008 and testified that he valued
3 the Residence at \$495,000.00.

4 7. On February 19, 2009, prior to the scheduled hearing on the Lien Strip
5 Motion, counsel for Lender filed an "Emergency Motion to Allow Late Filing of
6 Opposition" to the Lien Strip Motion. The Court allowed the late filed Opposition. In its
7 Opposition, Lender argued, based on a broker's opinion dated as of December 30, 2008, that
8 the value of the Residence was \$595,000.00. Based on the disputed valuation, the Court set
9 the matter for evidentiary hearing.

10 8. Lender timely filed the Declaration of Jim Dozois on February 25, 2009.
11 Mr. Dozois is a real estate broker licensed in the State of California who has approximately
12 24 years of experience in the real estate industry. He prepared a Comparative Market
13 Analysis Exterior report, which involved physical observation of the exterior of the
14 Residence and review of comparative sales in the surrounding area. Mr. Dozois valued the
15 Residence at \$595,000.00. A copy of his Comparative Market Analysis Exterior report was
16 attached to his declaration as Exhibit "A" and was introduced into evidence at the Valuation
17 Hearing. Thus, under Mr. Dozois' analysis, Lender was an under-secured not an unsecured
18 creditor.

19 **Legal Background.**

20 The Bankruptcy Code expressly provides that a chapter 13 plan may "modify the
21 rights of holders of secured claims, other than a claim secured only by a security interest in
22 real property that is the debtor's principal residence, . . . " 11 U.S.C. § 1322(b)(2). In
23 *Nobelman v. American Savings Bank et al*, 508 U.S. 324 (1993), the Supreme Court
24 confirmed that section 1322(b)(2) modification is not available when a section 506(a)
25 valuation establishes that a lender's claim is partially secured. After *Nobelman*, however,
26 the Ninth Circuit Court of Appeals, along with the majority of other circuit courts, held that
27 the anti-modification protection of section 1322(b)(2) does not prohibit modification of the
28 rights of a junior creditor holding a lien on a debtor's primary residence where senior liens

1 exceed the value of the residence such that the junior creditor is wholly unsecured².

2 *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002).

3 In this case, Debtors seek to modify the rights held by Lender pursuant to
4 section 1322(b)(2) and request that the Court determine the secured status of Lender's claim
5 pursuant to section 506(a).³ Section 506(a) provides that: "[s]uch value shall be determined
6 in light of the purpose of the valuation and of the proposed disposition or use of such
7 property, and in conjunction with any hearing on such disposition or use or on a plan
8 affecting such creditor's interest." In this case, Debtors intend to retain the Residence, to
9 avoid Lender's lien entirely, and to pay Lender's claim under their chapter 13 plan as a
10 wholly unsecured claim (*i.e.* Lender to receive a pro rata share of \$82,252.20). To
11 accomplish this goal, the value of the Residence cannot exceed the amount owed to the
12 holders of liens against the Residence that are senior to Lender's lien.

13 **Analysis Of Valuation Evidence.**

14 At the evidentiary hearing, this Court heard testimony from the real estate brokers
15 offered by and accepted as experts for the Debtors and the Lender. Their opinions reflect a
16 \$100,000.00 difference in value. Despite this wide difference in value, both experts utilized
17 a comparable sales approach to valuation. Not even one comparable, however, was
18 common to both opinions.

19 With such a substantial difference in a residential real property valuation, the Court's
20 analysis must focus on which opinion of value is more credible. To aid in this endeavor,
21 the Court focused on those factors typically utilized by other courts such as the experts'
22 methodologies, the quality of the report, their testimony on direct and cross examination,
23 and the experts' respective ability to substantiate the basis for the valuation. After

24
25 ² Such modification is commonly referred to as "lien stripping."

26 ³ Debtors' legal argument includes references to section 506(d). As clearly settled by the
27 Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410, 415-16 (1992), the function of section 506(d) is
28 to void "a lien whenever a claim secured by the lien itself has not been allowed." Thus, the
Supreme Court held that: section 506(d) does not allow a debtor to 'strip down' a creditor's lien,
where the creditor's claim is secured by a lien and has been fully allowed pursuant to section 502.
Dewsnup, 502 U.S. at 417. The Court reads *Dewsnup* as precluding a lien strip (*i.e.* an order
allowing a debtor to require reconveyance) based solely on a section 506(a) determination of

1 consideration of these factors, the Court concludes that Mr. Butner's opinion of value is
2 more credible. As a result, the Court finds that the Lender is an unsecured rather than
3 undersecured creditor and that the Debtors are entitled to strip Lender's lien under their
4 chapter 13 plan.

5 **Testimony of Melody Robertson.**

6 Debtors supported the Lien Strip Motion with the testimony of two witnesses,
7 Melody Robertson and Mr. Butner. Ms. Robertson testified that in her opinion her house
8 was worth \$450,000 to \$480,000. A property owner is qualified to give testimony as to
9 value. *In re Hirsch*, 351 B.R. 291, 297 (Bankr. EDNY 2006). Notwithstanding this fact, the
10 weight to be provided to such testimony is often minimal. In this case, however,
11 Ms. Robertson's testimony provided important background for the Court's decision.

12 First, she testified that her home was built in 1965, that Debtors have owned the
13 home for 18 years, and that during this 18-year period they have appropriately maintained
14 the Residence. Ms. Robertson also testified, however, that the Residence has not been
15 remodeled during her period of ownership and that, in particular, the kitchen dates from
16 1965.

17 On cross-examination, Ms. Robertson also provided information regarding the basis
18 for her opinion. In particular, she testified on cross-examination that the house next door
19 recently sold for \$600,000. She described the home as similar to her own floor plan.
20 However, she also testified that the previous homeowners substantially remodeled the home,
21 spending approximately \$200,000. She also testified that this remodel both significantly
22 updated the home and added square footage. The Court appropriately infers from this
23 testimony that Ms. Robertson believes that if substantial amounts were invested in her home
24 it could be sold for a higher price, but that such an investment could be as high as \$200,000.
25 Her valuation of \$450,000 to \$480,000 is, therefore, not unreasonable as a similar home
26 located next door recently sold for \$600,000 after a \$200,000 remodel.

27
28 collateral value.

1 On direct at a later point in the testimony, Ms. Robertson testified that Comparable 4
2 in Mr. Dozois' report also involved a remodel. It was her testimony that this house sold in
3 March of 2008 for \$500,000.00, was gutted and remodeled with an additional room added,
4 and then went back on the market at \$620,000.00.

5 **Mr. Dozois Did Not Appropriately Consider The Impact Of Interior Remodels**
6 **On Value.**

7 Ms. Robertson's testimony, thus, begins a theme critical to the Court's analysis, the
8 fact that her community contains a wide variety of homes including "original state" homes
9 such as the Residence as well as homes that have been substantially remodeled. As noted
10 above, the valuation experts for Debtors and Lender differed substantially. The Court,
11 having reviewed and carefully considered all the evidence, concludes that the Lender's
12 expert failed to appropriately consider the impact of substantial remodeling, and in one case
13 totally new construction, in selecting his comparables and in adjusting values relative to the
14 Residence.

15 Mr. Butner described the Residence as nice and clean. But, he also described it as
16 having "gramma feel" and likened entering the Residence to entering a "time warp."
17 Indeed, Mr. Butner, who is also an accredited staging professional, indicated that he would
18 prefer to show the Residence vacant as opposed to as currently furnished. Consistent with
19 this view, the pictures of the Residence admitted into evidence corroborate Ms. Robertson's
20 representation that the kitchen is an original 1960's kitchen and that substantial remodeling
21 has not occurred.

22 In contrast, the comparables relied upon by Mr. Dozois were homes that had been
23 remodeled. Indeed, one of these dwellings, sadly, was an entirely new dwelling rebuilt after
24 San Diego's last wave of wildfires. The Court received pictures of the interiors of certain of
25 these homes into evidence. The pictures depict open floor plans, light filled interiors, and
26 upgraded kitchens.

27 The testimony from Mr. Butner, which was not adequately rebutted by Mr. Dozois,
28 identifies two markets operating within the same geographic area. One market is for homes

1 that are upgraded, remodeled, or newly constructed. Given the age of the neighborhood,
2 there is a second market for homes which have not already been upgraded. Mr. Butner
3 testified that a buyer would likely buy a not yet updated home with the intention of
4 upgrading for the benefit of the buyer or in order to "flip" the home to a new buyer in order
5 to obtain a profit.

6 This testimony is consistent with Ms. Robertson's testimony regarding her neighbor's
7 home: the neighbor's home sold for \$600,000, but only after a \$200,000 remodel. While
8 the Court notes that Mr. Butner had fewer comparables, his explanation was adequate.

9 Mr. Dozois claimed to have adjusted for the "upgrades" to his comparables when
10 valuing the Residence. However, he was unable to specify the amount of any adjustment.
11 The Court found his inability to quantify this critical adjustment troubling. Further, he
12 never viewed the interior of the Residence, so any adjustment would be imprecise at best.
13 And he valued the Residence, a home with an interior dating from the 60's, higher than a
14 larger home, with a better view, that had been fully remodeled. Mr. Dozois' explanation for
15 his valuation lacked credibility as a result of his questionable use of fully remodeled
16 comparables and his inability to precisely specify the adjustments made on account of the
17 upgrades to his comparables. In short, the Court concludes that his valuation does not
18 appropriately take into account the cost that a buyer reasonably would assume necessary to
19 bring the Residence to the same condition as his comparables.

20 **Mr. Dozois Over-Emphasized The Impact Of Relative Noise Level On Value.**

21 The second theme throughout Mr. Dozois' testimony was the impact of noise. He
22 opined that the Residence was more valuable than the homes selected as comparable by
23 Mr. Butner as it was in a low noise area. Mr. Butner effectively refuted this suggestion on
24 cross-examination, however. He convincingly stated that noise issues are endemic to this
25 area of Rancho Bernardo and noted that the noise level at the Residence was "acceptable" as
26 was the case with his comparable properties.

27 Mr. Dozois, in contrast, failed to convincingly support his opinion that relative noise
28 levels supported the Court in finding his valuation superior. Among other things,

1 Mr. Dozois conducted a drive-by appraisal and, never entered the Residence. Mr. Butner
2 has been in the Residence, has been inside the home he viewed as most comparable, and
3 lives in an adjacent area that is the location of one of Mr. Dozois' comparables. Mr. Butner
4 describes his home neighborhood as very noisy.

5 **There Is No Evidence That Mr. Butner Has An Inappropriate Bias.**

6 The Court also disregards the Lender's suggestion that Mr. Butner is biased.
7 Mr. Butner testified that he has known Ms. Robertson for 17 to 18 years through church.
8 There was no evidence, however, of other than a somewhat remote social friendship/church
9 based relationship. Further, Mr. Butner was clear on the stand that Ms. Robertson did not
10 tell him why she needed a valuation and that even as he testified he was unaware of the
11 amount owed to the senior lender. To put it bluntly, Mr. Butner had no information
12 available to him when he conducted the valuation or when he testified that would have
13 allowed him to adjust his testimony or valuation in a manner favorable to the Debtors' case.

14 **CONCLUSION**

15 Thus, the Court finds Mr. Butner's opinion of value to be the more credible and
16 determines, as a result, that the value of the Residence is \$495,000.00. As a result, Debtors
17 are entitled to modify the Lender's trust deed in their chapter 13 plan as Lender is an
18 unsecured rather than an undersecured creditor.

19 Debtors are instructed to file an order consistent with this Memorandum Decision
20 within 10 days. The order should provide, among other things, that Lender will be treated
21 as an unsecured creditor by the Plan and that Lender will be required to reconvey its Trust
22 Deed only after completion of the Plan and Debtors' resultant discharge.

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Debtors' counsel is instructed to file an appropriate fee application seeking recovery of fees and costs from the estate and in excess of the presumptively reasonable fee within thirty days, if desired in this atypical case. The hearing on the fee application should be specially set so as to be heard in Department 3.

DATED: June 10, 2009


LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court