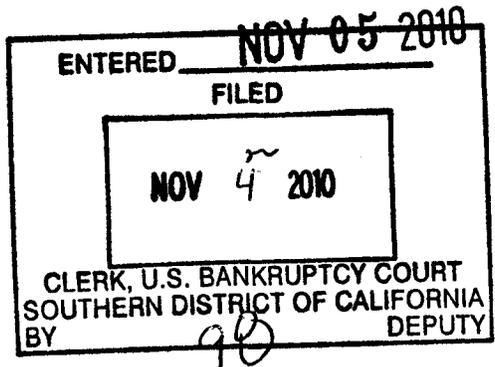


WRITTEN DECISION - NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:

IRENE IRANDOKHT PAIGAH
DINO MULONNI

Debtors.

BK. No. 09-19804

MEMORANDUM DECISION ON LIEN
STRIP MOTION

Debtors filed a Motion¹ for Stripping Wholly Unsecured Junior Deed of Trust in connection with confirmation of their Chapter 13 Plan (the "Lien Strip Motion") to which Wells Fargo Bank, N.A. ("Lender") filed an opposition. The only disputed issue in the Lien Strip Motion was the valuation of Debtors' primary residence located at 12757 Via Terceto San Diego, California

¹ This Court allows debtors to obtain a valuation determination under § 506(a) in aid of a section 1322(b)(2) lien strip by motion, but requires that debtors serve such motion as required by Rule 7004. See, *In re Pereira*, 394 B.R. 501, 506-507 (Bankr. S.D. Cal. 2008).

1 (“Residence”), located in the Montemar subdivision in Carmel Valley.² The Court held an
2 evidentiary hearing on this matter on November 1, 2010.

3 Debtors allege in the Lien Strip Motion that the value of the Residence is \$470,500, less
4 than the amount owed to the first trust deed holder in the stipulated amount of \$492,041. The
5 Debtors request that this Court confirm this valuation pursuant to Fed. R. Bankr. P. 3012. Debtors’
6 Chapter 13 plan filed December 28, 2009 calls for retention of the Residence and for Lender’s
7 second priority deed of trust to be determined to be unsecured, and “stripped” under 11 U.S.C.
8 §§506(a), 1322(b)(2) and 1325.³

9 Lender disputes Debtors’ valuation, alleging that it holds an undersecured rather than
10 unsecured claim, since the value of Debtors’ Residence as of December 28, 2009 is \$545,000 and
11 the first lien totals \$492,041. Lender argues Debtors cannot strip or otherwise modify its second
12 trust deed because it is not a wholly unsecured creditor.

13 The parties presented the testimony of expert appraisers Gary Bougher and Barry Williams.
14 Each qualified as an expert and provided expert written opinions regarding the value of the
15 Residence. Williams’ opinion of the value of the Residence as of December 28, 2009 was \$545,000
16 and Bougher’s opinion of the value of the Residence as of December 16, 2009 was \$470,500.

17 The Court has carefully reviewed the evidence contained in the written appraisal reports and
18 the testimony of the appraisers at the valuation hearing. The Court has also analyzed what date
19 should be the valuation date under applicable law. The Court now renders its decision on value and
20 the Lien Strip Motion.

21 I. Legal Analysis

22 The Bankruptcy Code expressly provides that a chapter 13 plan may “modify the rights of
23 holders of secured claims, other than a claim secured only by a security interest in real property that
24 is the debtor’s principal residence, . . . ” 11 U.S.C. § 1322(b)(2). In *Nobleman v. American Savings*
25 *Bank et al*, 508 U.S. 324 (1993), the Supreme Court confirmed that section 1322(b)(2) modification

26 ² That the Residence is the Debtors’ primary residence was not disputed at trial.

27 ³ References to code sections refer to Title 11 of the United States Code, also referred to as
28 the “Bankruptcy Code” unless otherwise specified. References to a “Rule” refer to the Federal
Rules of Bankruptcy Procedure, unless otherwise indicated.

1 is not available when a section 506(a) valuation establishes that a lender's claim is partially secured.
2 After *Nobleman*, however, the Ninth Circuit Court of Appeals, along with the majority of other
3 circuit courts, held that the anti-modification protection of section 1322(b)(2) does not prohibit
4 modification of the rights of a junior creditor holding a lien on a debtor's primary residence where
5 senior liens exceed the value of the residence such that the junior creditor is wholly unsecured.
6 *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002).⁴

7 In this case, Debtors seek to modify the rights held by Lender pursuant to section 1322(b)
8 and request that the Court determine the secured status of Lender's claim pursuant to section 506(a).
9 This requires that the Court determine the market value of the Residence "in light of the purpose of
10 the valuation and of the proposed disposition or use of such [Residence], and in conjunction with
11 any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C.
12 §506(a)(1). Market value is "[t]he most probable price which a Residence should bring in a
13 competitive and open market under all conditions requisite to a fair sale, the buyer and seller each
14 acting prudently and knowledgeably and assuming the price is not affected by undue stimulus."
15 *United States ex rel. Farmers Home Admin. v. Arnold & Baker Farms (In re Arnold & Baker*
16 *Farms)*, 177 B.R. 648, 657 (9th Cir. BAP 1994), *aff'd*. 85 F.3d 1415 (9th Cir. 1996), *cert. den.* 519
17 U.S. 1054 (1997).

18 II. Date of Value

19 The parties have not disputed that the Petition Date, or December 28, 2009, is the
20 appropriate date for valuation of the Residence. The petition date is the "watershed date of a
21 bankruptcy proceeding." *Johnson v. GMAC (In re Johnson)*, 165 B.R. 524,528 (S.D. Ga. 1994.) In
22 addition, "...creditors' rights are fixed (as much as possible)" as of this date. *Id.* This approach is
23 "clearly supported by 11 U.S.C. § 502 (b) which states the general rule that, when an objection to a
24 claim is raised ...the court, after notice and a hearing, shall determine the amount of such claim as
25 of the date of the filing of the petition..." *Brager v. Blum (In re Brager)*, 39 B.R. 441, 443 (Bankr.
26 E.D. Pa. 1984). Neither party argued nor submitted evidence that an adjustment to either

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28 ⁴ Such modification is commonly referred to as "lien stripping."

1 appraised value or comparables used was necessary due to an increase or decrease in property
2 values in relation to the petition date and the date of the appraisals. The Court therefore did not
3 consider this factor in making its adjustments to the comparables described above.

4 **III. Analysis of Valuation Evidence.**

5 Each appraisal was professionally conducted and each appraiser was well qualified. Both
6 relied most heavily on the comparable sales method of determining value. To differentiate between
7 the two appraisers' opinions, the Court considered the quality of the different appraisal reports, their
8 testimony on direct and cross examination, and the appraisers' respective ability to substantiate the
9 basis for their valuations. The Court found each expert generally to be credible and competent in
10 the rendering of their opinions. Since the Court cannot differentiate between the appraisers on this
11 basis, this finding would favor the Debtors' valuation evidence since the Lender bears the burden of
12 proof on the valuation issue in this context. *In re Sneijder*, 407 B.R. 46, 55 (Bankr. S.D. N.Y. 2009).

13 The Court's determination of value instead is based upon its resolution of the experts'
14 primary points of disagreement on the valuation factors of location and size, and the methodology
15 of selecting the comparable sales used by each expert to value the Residence.

16 A. Valuation Factors

17 1. Size

18 According to Bougher's measurements, the Residence has Gross Living Area ("GLA") of
19 1,331 square feet; approximately 200 less than the 1,532 square feet reported by the builder and
20 used by the County Tax Assessors. The Williams appraisal found that the Residence has a GLA of
21 1,546. The key differences with the two GLA calculations were that Williams included the air
22 space over the stairway, and the exterior portion of the fireplace in his calculation.

23 Bougher relied upon this size differential to select smaller properties than other units with
24 the same floor plan in the same subdivision. These same floor plan units in Montemar also report a
25 GLA of 1,532 square feet in the Multiple Listing Service. Bougher also used a greater range of
26 comparable properties.

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1 The Court is not convinced that the size of the Residence is materially smaller than identical
2 floor plan units in Montemar. While there may be size variations between these units, both
3 appraisers agreed that the floor plan was the same as that of other units in the complex, which
4 would include similar stairways and fireplaces. Ms. Paigah testified that her residence seemed
5 smaller to her than other units in the development, however this is not sufficient for the Court to
6 give it much weight. Whether stairways and fireplaces are included or excluded from the GLA
7 calculation, there is insufficient evidence to conclude that other units are not essentially the same
8 size.

9 2. Comparable Sales

10 Bougher testified that he selected his comparable sales primarily to bracket the Residence
11 with inferior and superior properties, whereas Williams testified that his comparables were chosen
12 for their degree of similarity to the Residence.

13 The only comparable shared by Bougher and Williams ("Shared Comparable") is a 1,532
14 square feet condominium located at 12763 Via Terceto, the same street as the Residence. Both the
15 Shared Comparable and the Residence are three bedroom end units. Three out of five comparable
16 sales used by Williams were located in the Montemar development, where the Residence is located.
17 Williams did not use two sales in Montemar which had occurred in the six month period prior to the
18 petition date, as reflected on Lender's Exhibit G. Bougher used four condominium properties
19 located outside Montemar, and only one within the development. Bougher's appraisal also omitted
20 two sales in the same development as the Residence, which were used by Williams. These two
21 sales were three bedroom condominiums with roughly the same floor plan as the Residence located
22 on Via Holgura. Bougher testified that he did not include these two sales as comparables because
23 one was 200 square feet larger than his measurement of the Residence, and the other did not appear
24 in his initial search.

25 The evidence did not establish which approach to selecting comparable sales was superior
26 from a professional standpoint, so the Court uses common sense to conclude that the more
27 comparable properties are the better indicator of value. The Court finds Williams' choice of
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1 comparables more convincing and bases its value finding upon the Montemar comparable sales
2 found in the expert reports and Exhibit G.

3 While Williams' choice of comparables is convincing, he made no adjustments to the value
4 of any of his comparable sales to account for factors such as view and location. These factors
5 nevertheless influence the Court's conclusion of value and the comparable sales prices must be
6 adjusted for these factors.

7 3. Location

8 Both Via Nieve and Via Terceto are the access roads for the Montemar development, and
9 both border the two busy streets of Carmel Country Road and Carmel Creek Road. Via Holgura is
10 an interior road backing on to open land without these detrimental factors. Williams' value opinion
11 for the Residence does not sufficiently take into account the location differences between the Via
12 Holgura properties and the other comparables. Not only did these sales receive the highest sales
13 prices among Williams' five comparables,⁵ the Lender's Exhibit G also reflects that these sales
14 were of higher prices than sales on Via Nieve and Via Terceto; the two comparable sales that were
15 not used by either expert in his report.⁶ Bougher concluded that the location of Shared Comparable
16 on Via Terceto is superior to the Residence in that it is subject to less car and pedestrian traffic and
17 is further from Carmel Creek Road.

18 4. View

19 The Shared Comparable also has a superior view per the MLS listing information.⁷
20 Lender's Exhibit C. Its sale price of \$535,000 is less than the two Via Holgura comparables.
21 Williams' value for the Residence does not properly adjust for the inferior location or lack of view.
22 His opinion of value of \$545,000 is thus overstated.

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25 ⁵ 3944 Via Holgura sold on November 24, 2009 for \$549,000. 3972 Via Holgura sold on
October 29, 2009 for \$557,200.

26 ⁶ Williams rejected the Via Nieve comparable because it was a short sale and the three
bedroom Via Terceto comparable sale because the Residence has three bedrooms.

27 ⁷ The "site features" section of MLS for the Shared Comparable does not indicate that the
property has views, but the "remarks and showing info" section states that the property has beautiful
28 park and mountain views. Lenders' Exhibit C.

1 B. Reconciliation of Factors

2 The Court determines the value of the Residence by using only the Montemar comparable
3 sales but adjusting them to reflect the location and view of the Residence. Based upon all of the
4 testimony, the five most comparable sales to the Residence are: 1) 12763 Via Terceto (the Shared
5 Comparable); 2) 12767 Via Terceto; 3) 12728 Via Nieve, 4) 3972 Via Holgura; and 5) 3944 Via
6 Holgura. All other comparable sales were outside the Montemar development. The two Via
7 Holgura properties establish the high end of the range because they are located in a more private
8 section of the development and do not face a main thoroughfare. They thus have a superior location
9 within the Montemar neighborhood compared with the Residence.

10 To adjust for their superior location as compared with the Residence, the Court makes a
11 negative adjustment of \$16,000 on each of the Via Holgura properties which sold for \$549,000 and
12 \$557,200, this adjustment results in comparable values of \$533,000 and \$541,200 respectively.
13 This location adjustment is based upon the negative adjustment made by Bougher of \$16,000 to the
14 Shared Comparable's sale price.

15 For Shared Comparable's superior view, Bougher made an additional negative adjustment of
16 \$7,500. The Court finds Bougher's adjustments for view and location persuasive. However,
17 Bougher also made a negative adjustment of \$9,800 for the date of the sale and an \$8,000 negative
18 adjustment to account for GLA, which the Court does not find supported by the evidence. The
19 Court will add back \$17,800 to the \$495,700 adjusted value of the Shared Comparable. This
20 analysis derives to a value of \$513,500 for the Shared Comparable.

21 The other Via Terceto sale that occurred during a 6-month time span from June 28, 2009 to
22 December 28, 2009 was a two bedroom townhome with a sales price of \$480,000. This comparable
23 sale is closest in location and age to the Residence, but is smaller and has one less bedroom. The
24 Court gives this comparable sale significant weight, but makes adjustments based upon the
25 difference in the number of bedrooms. Bougher's Comparable #4 was a two bedroom townhome
26 outside of the Montemar development. For the difference in the number of bedrooms, Bougher
27 made an upward adjustment of \$10,000. The Court will make the same adjustment to sale price of
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1 12767 Via Terceto. Therefore, the Court increases the value of 12767 Via Terceto by \$10,000,
2 giving a total value of \$490,000.

3 The property located at 12728 Via Nieve is a short sale that sold for \$495,500 on December
4 15, 2009. Similar to the Residence, it is located next to a busy thoroughfare in the Montemar
5 development and has the same floor plan. No evidence was available to support any specific
6 adjustment for the short sale factor.

7 The Court then averaged the values derived from adjusting these five comparable sales. This
8 process determines a value of the Residence of \$514,640, which the Court will round up to
9 \$515,000.

10 **IV. Conclusion**

11 The Court values the Residence at \$515,000. Therefore, the Lender is an undersecured
12 creditor and its lien may not be stripped from the Residence. Debtors' Lien Strip Motion is denied.
13 The Court requests Lender's counsel to submit the order accordingly.

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15 IT IS SO ORDERED.

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DATED: _____

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MARGARET M. MANN, JUDGE