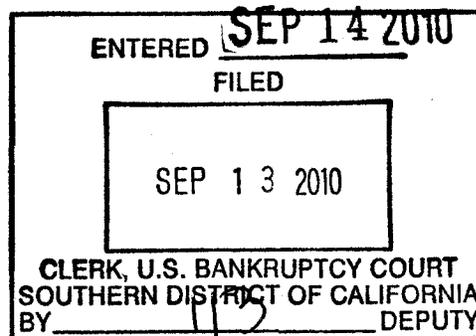


WRITTEN DECISION - NOT FOR PUBLICATION



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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

<p>In re:</p> <p>Mark R. Malamatos</p> <p style="padding-left: 150px;">Debtor.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>BK. No. 10-11857-MM13</p> <p>MEMORANDUM DECISION ON LIEN STRIP AND RELIEF FROM STAY MOTION</p>
<p>In re:</p> <p>Marion Anna Malamatos</p> <p style="padding-left: 150px;">Debtor.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>BK. No. 10-08483-MM13</p> <p>MEMORANDUM DECISION ON LIEN STRIP AND RELIEF FROM STAY MOTION</p>

Debtors Marion and Mark Malamatos are mother and son (collectively, "Debtors") who filed separate Chapter 13 bankruptcy petitions on May 18, 2010, and July 3, 2010, respectively. Both filed Motions¹ for Valuation of Debtors' Residence and Avoidance of Second Trust Deed in connection with confirmation of their individual Chapter 13 Plans (the "Lien Strip Motions").

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

1 Lender also filed motions for relief from stay² in each of the Debtors' cases, the common issue in
2 which was the valuation of the Debtors' primary residence ("Residence").³ Due to the
3 commonality of issues, and with the concurrence of the parties, the Court held an evidentiary
4 hearing on all of these matters⁴ on September 1, 2010.

5 Debtors allege in the Lien Strip Motions that the value of their primary residence
6 ("Residence"), which is held by them as joint tenants, is \$190,000, less than the amount owed to the
7 first trust deed holder EverHome Mortgage in the undisputed amount of \$208,588.92. They each
8 request that this Court confirm this valuation pursuant to Fed. R. Bankr. P. 3012.⁵ Each of the
9 Debtors' Chapter 13 plans call for Lender's second priority deed of trust to be determined to be
10 unsecured, and "stripped" under 11 U.S.C. § 1322(b)(2) pursuant to these plans.⁶

11 Lender disputes Debtors' valuation, alleging that it holds an undersecured rather than
12 unsecured claim, since the value of the Debtors' Residence is \$255,000 and the EverHome
13 Mortgage lien totals \$208,588.92. Lender argues Debtors cannot strip or otherwise modify its
14 second trust deed because it is not a wholly unsecured creditor.

15 The parties presented the direct testimony of expert appraisers Dan Candler and Tim Fitting
16 by declaration. Each qualified as an expert and provided expert written opinions regarding the
17 value of the Residence located at 2665 54th Avenue in the City Heights neighborhood of San Diego,
18 California. Chandler's opinion of value as of June 7, 2010 was \$255,000 and Fitting's opinion of
19 value as of April 19, 2010 was \$190,000.

20 The Court has carefully reviewed the evidence contained in the written appraisal reports and
21 the testimony of the appraisers at the valuation hearing. The Court has also analyzed what date

22
23 Rule 7004. *See, In re Pereira*, 394 B.R. 501, 506-507 (Bankr. S.D. Cal. 2008).

24 ² The other issues raised regarding the relief from stay motions are set forth below.

25 ³ That the subject Residence is the Debtors' primary residence was not disputed at trial.

26 ⁴ The Debtors' also filed a claim objection to Lender's proof of claim. However, that
27 objection was withdrawn on the record after all of Lender's evidence was admitted without dispute,
28 and the proof of claim will be allowed in the amount as filed of \$127,640.02.

⁵ Marion's Chapter 13 plan was filed May 18, 2010, and Mark's Chapter 13 plan was filed
July 3, 2010. Both plans call for retention of the Residence and for Lender's deed of trust to
be avoided as unsecured.

⁶ 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 a "Rule" refer to the Federal
Rules of Bankruptcy Procedure, unless otherwise indicated.

1 should be the valuation date under applicable law. The Court now renders its decision on value and
2 sets a briefing schedule to resolve the remaining issues in the relief from stay motions.

3 **I. Legal Analysis**

4 The Bankruptcy Code expressly provides that a chapter 13 plan may "modify the rights of
5 holders of secured claims, other than a claim secured only by a security interest in real Residence
6 that is the debtor's principal residence, . . . " 11 U.S.C. § 1322(b)(2). In *Nobelman v. American*
7 *Savings Bank et al*, 508 U.S. 324 (1993), the Supreme Court confirmed that section 1322(b)(2)
8 modification is not available when a section 506(a) valuation establishes that a lender's claim is
9 partially secured. After *Nobleman*, however, the Ninth Circuit Court of Appeals, along with the
10 majority of other circuit courts, held that the anti-modification protection of section 1322(b)(2) does
11 not prohibit modification of the rights of a junior creditor holding a lien on a debtor's primary
12 residence where senior liens exceed the value of the residence such that the junior creditor is wholly
13 unsecured. *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002) ⁷.

14 In this case, Debtors seek to modify the rights held by Lender pursuant to section 1322(b)
15 and request that the Court determine the secured status of Lender's claim pursuant to section 506(a).
16 This requires the Court determine the market value of the Residence "in light of the purpose of the
17 valuation and of the proposed disposition or use of such [Residence], and in conjunction with any
18 hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C.
19 §506(a)(1). Market value is "[t]he most probable price which a Residence should bring in a
20 competitive and open market under all conditions requisite to a fair sale, the buyer and seller each
21 acting prudently and knowledgeably and assuming the price is not affected by undue stimulus."
22 *United States ex rel. Farmers Home Admin. v. Arnold & Baker Farms (In re Arnold & Baker*
23 *Farms)*, 177 B.R. 648, 657 (B.A.P. 9th Cir. Ariz. 1994), *aff'd*. 85 F.3d 1415 (9th Cir. 1996), *cert.*
24 *den.* 519 U.S. 1054 (1997). As the Lien Strip Motions are brought under § 506(a), the Lender has
25 the burden of proof of the market value of the Residence. *In re Sneijder*, 407 B.R. 46, 55 (Bankr.
26 S.D. N.Y. 2009).

1 **II. Analysis of Valuation Evidence.**

2 Each appraisal was professionally conducted and each appraiser was well qualified. Both
3 relied most heavily on the comparable sales method of determining value, and only secondarily
4 used the cost valuation method. To differentiate between the two appraisers' opinions, the Court
5 considered the quality of the different appraisal reports, their testimony on direct and cross
6 examination, and the appraisers' respective ability to substantiate the basis for the valuation.

7 The experts' primary points of disagreement were on the valuation factors of location and
8 condition of the Residence, and the current nature of the comparable sales. These factors largely
9 determined which comparable sales each appraiser selected to evaluate. Out of 14 comparable
10 sales, their selections overlapped in the case of only one comparable. Fitting's comparable sales
11 were largely selected to be similar to the inferior location of the Residence. Candler's comparable
12 sales were primarily selected to reflect the curb appeal of the Residence, and were generally more
13 recent than Fitting's comparable sales.

14 A. Location

15 The Residence is located near the intersection on a busy traffic street and is subject to street
16 noise. Candler agreed location was a "very important" factor in determining value and that the
17 Residence was located in a "heavy traffic" area. However, Candler did not choose the comparable
18 sales closest to the Residence, or those sales located on the busy section of 54th Street similar to the
19 Residence. Maps provided by each expert visually establish that Fitting's choice of comparables
20 were in closer vicinity to the Residence. Fitting provided aerial maps of Candler's comparable
21 properties that showed them to be in locations further from traffic noise and congestion. Fitting also
22 supported his opinion with an analysis of comparables sales dating from when the Debtors
23 purchased the Residence in 1997, showing properties located close to the Debtor on 54th Street fell
24 at the low end of the value range for the area comparables and had delayed marketing time.

25 Lender challenged Fitting's analysis on several bases. First, Lender asserted Fitting had
26 erred by not reporting later sales on two of his comparable properties. However, Fitting explained
27 that his date of value predated this information. To take into account the possible staleness of

28 ⁷ Such modification is commonly referred to as "lien stripping."

1 Fitting's comparable sales, the Court has adjusted Fitting's value of the Residence to determine its
2 value as of July 3, 2010, the date debtor Mark Malamatos filed his Chapter 13 bankruptcy case.

3 Second, Lender challenged that Fitting double adjusted for the location by choosing his
4 comparables based upon inferior locations and then adjusted again for this factor. The Court finds
5 Fitting adequately explained that there was no double adjustment. He clarified that the location
6 factor was germane for two separate purposes: to choose truly comparable properties, and to
7 specifically compare the Residence to a particular comparable sale.

8 B. Condition

9 Both experts agreed that the Residence is a 1317 square foot house with attractive new
10 exterior siding and front landscaping. They also agreed that the interior and back yard of the
11 Residence were not renovated, and the bathroom suffers from water damage. The experts differed
12 substantially on their views of the overall condition of the Residence, with Candler more positive
13 than Fitting.

14 The Court agrees with Fitting's view regarding the relatively inferior condition of the
15 Residence for two reasons. First, Candler did not notice the severe degree of water damage in the
16 bathroom during his physical inspection, and was evasive on this point during his testimony.
17 Candler also did not notice the tile cracks, drywall damage or problems with driveway during his
18 inspection. While he admitted that the backyard fence needed repairs, Candler did not mention this
19 issue in his report. Second, the Court is aware of these problems with the condition of the
20 Residence by its own review of the color photographs submitted by both appraisers.

21 The Court finds overall Fitting's appraisal was more accurate and his testimony was more
22 direct. The Court also gives the most weight to Fitting's opinion because of corroborating evidence
23 of the impact that its location has had on the value of the Residence, and because Candler did not
24 give sufficient weight to the problems with the interior condition of the Residence, which would
25 detract from its initial curb appeal. Thus, the Court finds Fitting's opinion that the value of the
26 Residence is \$190,000.00 to be the more credible.

1 **III. Date of Value**

2 The parties have not disputed that the Petition Date is the appropriate date for valuation of
3 the Residence. The petition date is the "watershed date of a bankruptcy proceeding." *Johnson v.*
4 *GMAC (In re Johnson)*, 165 B.R. 524,528 (S.D. Ga. 1994.) In addition, "...creditors' rights are
5 fixed (as much as possible)" as of this date. *Id.* This approach is: "clearly supported by 11 U.S.C.
6 § 502 (b) which states the general rule that, when an objection to a claim is raised ...the court, after
7 notice and a hearing, shall determine the amount of such claim as of the date of the filing of the
8 petition..." *Brager v. Blum (In re Brager)*, 39 B.R. 441, 443 (Bankr. E.D. Pa. 1984). The
9 challenge here is that the Debtors have different petition dates: Marion, May 18, 2010 and Mark,
10 July 3, 2010.

11 Fitting testified the value of residential real estate in the City Heights area is increasing in
12 value, although the rate of increase, or delta, varies over time. Per Candler's testimony, City
13 Heights' real estate values increased 25.7% between March 2009 and March 2010, and 31%
14 between April 2009 and April 2010. The average of these two deltas is 28.35%. The length of time
15 between the date of Fitting's April 23, 2010 appraisal and Mark Malamatos' petition date of July 3,
16 2010 is 10 weeks, or 19% of a year. If Fitting's value of \$190,000 were increased by 5.46% (19%
17 of an average annual increase of 28.35%) of a year, his value would increase by \$10,374. Lacking a
18 preferable option, the Court used this methodology as a test to determine if the increasing value is
19 material to the Court's decision. *In re: Abruzzo*, 249 B.R. 78, 86 (Bankr. E.D. PA 2000)(Court
20 permitted to reach own conclusions of value if based upon the evidence).

21 Adjusting Fitting's appraisal to the date of value of July 3, 2010 would yield a value of
22 \$200,374, which the Court will round to \$200,000. Even with this updated value, Lender thus is an
23 unsecured, rather than an undersecured creditor and its lien may be stripped from the Residence.

24 **IV. Relief from Stay Issues**

25 Lender seeks relief from stay pursuant to § 362(d)(1) (cause, including lack of adequate
26 protection of an interest in property), and § 362(d)(2) (lack of equity and property not necessary for
27 an effective reorganization).
28

1 As to adequate protection, the evidence was undisputed that the first lien holder, EverHome
2 Mortgage, is current. It was also undisputed that Debtors have made no payments to the Lender
3 during this case. Nevertheless, having determined that Lender is wholly unsecured, Lender has no
4 secured claim entitled to adequate protection. Lender's right to adequate protection is limited to the
5 amount of the secured claim. *See United Sav. Assosn. of Texas v. Timbers of Inwood Forest Assocs.,*
6 *Ltd.*, 484 U.S. 365, 375-76 (1988); *La Jolla Mortg. Fund v. Rancho El Cajon Associates*, 18 B.R.
7 283, 286 (Bankr. S.D. Cal. 1982). Since Lender has no secured claim, it is not entitled to adequate
8 protection and the Court accordingly denies relief from stay on this issue.

9
10 As to Lender's alternative ground for relief from stay under § 362(d)(2), it is undisputed the
11 Debtors lack equity in the Residence due to the size of the EverHome Mortgage senior lien in the
12 amount of \$208,588.92 and Lender's second lien deed of trust in the amount of \$127,640.02. The
13 total liens encumbering the Residence are approximately \$340,000, greater than either appraiser's
14 opinion of value of the Residence.

15
16 Even though Lender has met the lack of equity element of § 362(d)(1) as to which the
17 Lender bears the burden of proof, the Court must also consider whether the Debtors can
18 demonstrate that the Residence "is necessary for an effective reorganization that is in prospect."
19 *Timbers*, 484 U.S. at 375. The Debtors bear the burden of proof on this issue. § 362(g). According
20 to *Timbers*:

21
22 What this [demonstrating the property is necessary to an effective reorganization] requires is
23 not merely a showing that if there is conceivably to be an effective reorganization, this
24 property will be needed for it; but that the property is essential for an effective
25 reorganization *that is in prospect*. This means, as many lower courts ... have properly said,
26 that there must be "a reasonable possibility of a successful reorganization within a
27 reasonable time."

28
Timbers, id. (emphasis added)

1 The Debtors have established, and Lender has conceded, that the Residence is necessary for
2 a reorganization of each of the Debtors. It is after all their home. Marion is over 80 years old. In
3 fact, Lender has asserted that the Debtors' Chapter 13 cases were filed for the sole purpose of
4 stripping its lien. Under *Timbers*, the critical importance of the Residence to the Debtors'
5 reorganization does not end the analysis though. Debtors must also establish that the Debtors'
6 proposed reorganization is feasible within a reasonable time.

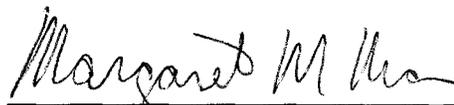
7 Lender disputes that the Debtors will be able to reorganize since it claims the Debtors'
8 Chapter 13 cases were filed in bad faith, as well as because Mark Malamatos is not entitled to a
9 discharge in his Chapter 13 case. Whether the Debtors can successfully reorganize in a reasonable
10 time is an issue on which the Court will require further briefing from the parties and the Trustee.

11 **V. Conclusion**

12 The Court values the Residence at \$200,000, and requests Debtors counsel submit orders on
13 the Lien Strip motions. The Court also sets a hearing and a briefing schedule on whether the
14 Debtors' Chapter 13 Plans can be successfully confirmed in a reasonable time. The hearing will be
15 on October 20, 2010, at 10:00 a.m. Further briefs on the issue are to be filed with the Court and
16 exchanged by the parties no later than September 29, 2010.

17
18 IT IS SO ORDERED.

19 DATED: 9/13/10


MARGARET M. MANN, JUDGE