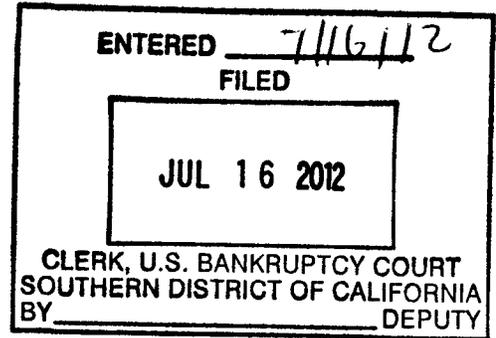


WRITTEN DECISION – NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:)	BK. No. 11-09732-MM13
MARCIA L. TREMBLAY)	Chapter 13
Debtor.)	MEMORANDUM DECISION ON MOTION FOR VALUATION OF RESIDENCE AND AVOIDANCE OF JUNIOR TRUST DEED HELD BY JP MORGAN CHASE BANK
)	Date: June 13, 2012
)	Time: 9:30 a.m.
)	Courtroom: 1

On February 1, 2012 , Marcia L. Tremblay (the "Debtor") filed a Motion (the "Lien Strip Motion") to Value Real Property, Treat Claim as Unsecured and Avoid Junior Lien of J.P. Morgan Chase Bank ("Chase") as successor-in-interest to Washington Mutual Bank under 11 U.S.C.

§§ 506(a), 1322(b)(2) and 1325.¹ The Lien Strip Motion was supported by an appraisal valuing at

¹ The Debtor may seek a valuation determination under 11 U.S.C. § 506(a) in aid of an 11

1 \$330,000 the Debtor's primary residence² located at 3731 Caminito Carmel Landing, San Diego,
2 California ("Residence"), located in The Groves subdivision in the Carmel Valley area of the city.

3 Asserting that the Residence is valued at \$350,000, Chase filed an opposition to the Lien
4 Strip Motion and objected to the Debtor's Plan. Chase argues that the Debtor cannot strip or
5 otherwise modify its second trust lien because it is not wholly unsecured. The senior lien owed to
6 Bank of America, N.A. is in the amount \$335,022.37 per its amended proof of claim. Chase's
7 appraised value of the Residence at \$350,000 would render its junior lien is partially secured. As
8 such, Chase's junior lien could not be stripped under § 1322(b)(2).

9 The Court held an evidentiary hearing on June 13, 2012, to determine the value of the
10 Residence. The parties presented the testimony of expert appraisers: the Debtor proffered Carlos J.
11 Guerrero who valued the Residence as of January 25, 2012, at \$330,000; Chase proffered Scott W.
12 Clemons who valued the Residence as of January 3, 2012, at \$350,000. Each qualified as an expert
13 and provided written opinions and testimony regarding the value of the Residence.

14 The Court has carefully reviewed the evidence contained in the written appraisal reports and
15 the testimony of the appraisers at the valuation hearing. The Court now renders its decision valuing
16 the Residence at \$330,000 and grants the Debtor's Lien Strip Motion because there is no value in
17 excess of the senior lien to secure Chase's claim.

18 **I. Legal Analysis**

19 The Bankruptcy Code expressly provides that a chapter 13 plan may "modify the rights of
20 holders of secured claims, other than a claim secured only by a security interest in real property that
21 is the debtor's principal residence." 11 U.S.C. § 1322(b)(2). In *Nobleman v. American Savings*
22 *Bank*, 508 U.S. 324, 328 (1993), the Supreme Court confirmed that an 11 U.S.C. § 1322(b)(2)
23 modification is not available when an 11 U.S.C. § 506(a) valuation establishes that a lender's claim
24 is partially secured. After *Nobleman*, however, the Ninth Circuit Court of Appeals, along with the
25 majority of other circuit courts, held that the anti-modification protection of 11 U.S.C. § 1322(b)(2)

26
27 U.S.C. § 1322(b)(2) lien strip by motion, but the motion must be served as required by Rule 7004.
28 *See In re Pereira*, 394 B.R. 501, 506-507 (Bankr. S.D. Cal. 2008).

² Chase did not dispute that the Residence is Debtor's primary residence.

1 does not prohibit modification of the rights of a junior creditor holding a lien on a debtor's primary
2 residence where senior liens exceed the value of the residence rendering junior liens wholly
3 unsecured. *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220, 1227 (9th Cir. 2002).³

4 In this case, the Debtor seeks to modify the rights held by Chase pursuant to 11 U.S.C. §
5 1322(b) and requests that the Court determine the secured status of Chase's claim pursuant to 11
6 U.S.C. § 506(a). This requires that the Court determine the market value of the Residence "in light
7 of the purpose of the valuation and of the proposed disposition or use of [the Residence], and in
8 conjunction with any hearing on such disposition or use or on a plan affecting such creditor's
9 interest." 11 U.S.C. § 506(a)(1). Market value is defined as "the most probable price which a
10 property should bring in a competitive and open market under all conditions requisite to a fair sale,
11 the buyer and seller each acting prudently and knowledgeably and assuming the price is not affected
12 by undue stimulus." *United States ex rel. Farmers Home Admin. v. Arnold & Baker Farms (In re*
13 *Arnold & Baker Farms)*, 177 B.R. 648, 657 (B.A.P. 9th Cir. 1994) (internal quotations omitted),
14 *aff'd*, 85 F.3d 1415 (9th Cir. 1996).

15 **I. Date of Value**

16 The petition date is the "watershed date of a bankruptcy proceeding;" thus, "creditors' rights
17 are fixed (as much as possible)" as of this date. *Johnson v. GMAC (In re Johnson)*, 165 B.R. 524,
18 528 (S.D. Ga. 1994). "[T]he determinative date for whether a claim is secured by a debtor's
19 principal residence is, like all claims, fixed at the petition date." *BAC Home Loans Servicing, LP v.*
20 *Abdelgadir (In re Abdelgadir)*, 455 B.R. 896, 903 (B.A.P. 9th Cir. 2011). This approach is
21 supported by 11 U.S.C. § 502(b), which states the general rule that "when an objection to a claim is
22 raised, the court, after notice and a hearing, shall determine the amount of such claim . . . as of the
23 date of the filing of the petition." 11 U.S.C. § 502.

24 Both parties valued the Residence as of January 2012, six months after the petition date of
25 June 10, 2011. Neither party argued or submitted evidence that an adjustment to either appraised
26 value or comparables used was necessary due to an increase or decrease in property values in
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28 ³ Such modification is commonly referred to as "lien stripping."

1 relation to the petition date and the date of the appraisals. In fact, both appraisers listed
2 Condominium Unit Housing Trends as stable. While the Court did not make any adjustments to
3 value the Residence six months earlier than the dates of the appraisals, the Court did consider the
4 June 2011 comparable sales that Mr. Clemons had excluded from his analysis as too remote in time.

5 **II. Burden of Proof**

6 Chase bears the burden of proof on the value of the Residence. *In re Sneijder*, 407 B.R. 46,
7 55 (Bankr. S.D. N.Y. 2009).

8 **III. Analysis of Valuation Evidence**

9 A. Credibility

10 Each appraisal was professionally conducted and each appraiser is well-qualified. Both
11 relied most heavily on the comparable sales method of determining value. To differentiate between
12 the two appraisers' opinions, the Court considers the quality of the different appraisal reports, their
13 testimony on direct and cross examination, and the appraisers' respective ability to substantiate the
14 bases for their valuations.

15 While the Court found each expert generally to be credible and competent in the rendering
16 of their opinions, the Court found Mr. Guerrero to be the more credible witness. Mr. Guerrero was
17 more observant regarding the details of the Residence, such as the traffic noise and smell of mold;
18 these factors were not noticed by Mr. Clemons. The analysis of Mr. Clemons was also more
19 perfunctory than thoughtful, leading him to overlook the unique negative features of this property.
20 The Court generally finds Mr. Guerrero's analysis to be more persuasive.

21 Debtor also testified as to the poor condition of the Residence, but the Court did not find her
22 very credible because her bias was evident. Further, much of the poor condition of the Residence
23 was due to her neglect. Because of this, her testimony did not factor heavily into the Court's
24 reasoning.

25 B. Specific Valuation Factors

26 Both appraisers testified that they chose their most comparable properties based on degree of
27 similarity to the Residence using a multitude of factors, including similarity of the structure,
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1 proximity, street noise, condition, and timing of the sale. Then, they bracketed the Residence with
2 inferior and superior properties. The main differentiating factors for the appraisers were the
3 location, condition, and nature of the comparable sales. The Court considers each factor separately.

4 1. Location

5 The Residence is located on the corner of Valley Centre Road and Carmel Vista Road.
6 Valley Centre Road is a large thoroughfare in the Carmel Valley community with relatively high
7 traffic. One block west, Valley Centre Road intersects with another major thoroughfare, El Camino
8 Real Road. Interstate 5 and Interstate 56 run approximately one quarter-mile west and south of the
9 Residence.

10 The impact of traffic noise resulting from the proximity of these major roads was a major
11 distinction between the two appraisers. Mr. Guerrero testified that traffic noise from the streets and
12 freeways was evident from the front lawn and upstairs, as did the Debtor. He testified that a
13 marginal adjustment was appropriate for the noise, and that he selected three of his comparable
14 properties (#3, #4, and #5) due to their proximity to freeways or high-traffic streets. Mr. Clemons,
15 in contrast, testified that he did not hear any significant traffic noise when standing in the front yard
16 nor did he notice it upstairs. He also testified that he has difficulty hearing and wears a hearing aid.
17 He did not consider traffic noise in his appraisal in any respect.

18 The Court finds the location of the Residence is adverse to the comparables due to traffic
19 noise, and favors Mr. Guerrero's selection of comparables chosen to account for this factor.

20 2. Physical Condition

21 Mr. Guerrero and Mr. Clemons also disagree on the condition of the Residence. The experts
22 explained that the Uniform Appraisal Dataset (UAD) used in their reports adopts a C1 through C6
23 grading scale for the condition of properties. Grade C1 is the highest rating and represents recently
24 constructed and previously unoccupied residences, while Grade C6 represents properties with
25 severe structural issues and substantial damage to the property.

26 The Residence and comparable properties in both appraisals were ranked between C3 and
27 C5. Grade C3 represents well maintained properties with limited physical depreciation. Grade C4
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1 represents properties with minor deferred maintenance and physical deterioration, but requires only
2 minimal mechanical repairs and cosmetic repairs. Grade C5 represents properties with obvious
3 deferred maintenance in need of significant repairs whose livability is somewhat diminished as a
4 result.

5 Mr. Guerrero testified that he graded the Residence C5 due to peeled flooring, soiled
6 carpets, holes in walls and ceilings, damaged dry wall, neglected landscaping, missing outlet covers,
7 cracked and chipped tiling, and a noticeable odor indicating potential mold and mildew. These
8 problems reflect not only neglect, but also potential structural concerns that would deter buyers,
9 particularly when added to the unattractive traffic noise. Mr. Guerrero also testified that the
10 Residence is a "fixer" and that market reaction to the condition of the property would be
11 significantly adverse. On cross-examination, he reiterated his view that the condition of the
12 Residence was so poor as to justify bottom-of-the-market pricing.

13 Mr. Clemons testified that he graded the Residence C4 rather than C5 because one of the
14 key elements of C5 is diminished livability. Though he testified that the Residence did have
15 deferred maintenance issues, the fact that the Debtor still lives there convinced him that the
16 Residence had not suffered diminished livability within the meaning of C5.

17 After reviewing both appraisals, the testimony of the parties' respective appraisers, and the
18 UAD Definitions of Condition, the Court finds that C5 is the proper condition for the Residence.
19 The Court is satisfied that significant repairs are necessary due to the damaged carpet, multiple
20 holes in the walls and ceilings, likely mold that Mr. Guerrero could sense by its odor, and overall
21 poor condition of the Residence's interior. The extent of damage to the improvements would suggest
22 structural integrity issues to any informed potential buyer, pushing down the price. The livability is
23 at the bottom of the applicable spectrum as well evidenced by the appraisal photographs.

24 On a technical basis as well, Mr. Clemons gave too much significance to the Debtor's
25 inhabitation of the Residence. In the UAD Definitions of Condition, C5 defines "overall livability"
26 as being "somewhat diminished due to condition, but the dwelling remains useable and functional
27 as a residence." Mr. Clemons' recognition that the Residence was worse than a C4 is demonstrated
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1 by his identification of comparable #5 as also having a C4 condition, but then adjusting it negatively
2 by \$20,000 to compare to the Residence. By making this substantial negative adjustment to place
3 the Residence on par with a comparable C4 property, Mr. Clemons indicated that he regarded the
4 property to be in substantially worse condition than other C4 properties.

5 That Debtor lives in her Residence does not prevent its condition being categorized as C5 as
6 Mr. Clemons claims. The relevance of this ranking is to determine value, and value is based upon
7 the perspective of buyers who, unlike the Debtor, have other choices of where to live. Although
8 some or even most of the blame for the condition of the Residence may fall on the Debtor, the job
9 of the Court is simply to decide the appropriate value for the Residence in its state on the date of
10 valuation. *See Pees v. DAN Joint Venture II (In re Claar)*, 368 B.R. 670, 679 (Bankr. S.D. Ohio
11 2007) (finding that allegations regarding debtor's failure to maintain the property do not impact the
12 court's determination of the value of the property).

13 The Court is persuaded by the testimony and photographs that the proper condition of the
14 property is C5, which again favors Mr. Guerrero's analysis.

15 3. Time Frame for Comparable Sales

16 Mr. Clemons' appraisal omitted two recent sales that were used by Mr. Guerrero. Mr.
17 Clemons testified that he did not include the properties, 3638 Caminito Carmel Landing and 3534
18 Caminito Carmel Landing, because they had been sold more than six months prior to the appraisal.
19 Mr. Clemons testified that properties sold more than six months prior to the effective date of the
20 appraisal cannot be used per the guidelines of Mr. Clemons's appraisal management company. The
21 exclusion of these comparables diminished the credibility of the Mr. Clemons's appraisal since these
22 sales were the closest to the legal valuation date of the petition date, June 10, 2011. By omitting
23 these sales, Mr. Clemons missed information relevant to valuing the Residence on the petition date.

24 C. Reconciliation of Factors

25 Typically, the best comparables for the Residence would have been the similar or identical
26 condominiums in the same development, The Groves. This obvious point was reflected by the
27 experts' choice of comparables. Half of Mr. Guerrero's and two-thirds of Mr. Clemons's
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1 comparables were located in The Groves development. Mr. Clemons's appraisal also indicated that
2 other properties were available in that neighborhood, which is an attractive suburban residential
3 district in close proximity to major public schools, shopping, employment opportunities, and
4 freeway system. Looking primarily at The Groves comparables, as did Mr. Clemons's analysis,
5 supports his value of \$350,000.

6 After hearing the testimony, however, the Court concluded Mr. Clemons's focus on The
7 Grove's properties led to a shallow analysis. The appalling physical condition of the Residence, in
8 the least favorable location in The Groves, cannot be as minimally discounted as Mr. Clemons did
9 in his analysis. As testified by Mr. Guerrero, the Court finds that a potential buyer would not
10 purchase the Residence when there are numerous preferable options in the same development unless
11 the Residence was substantially discounted over the other properties in the neighborhood.

12 Mr. Guerrero explained that he did not rely upon a property-by-property comparison to
13 reach his final conclusion of value. Instead he considered the characteristics of all of his selected
14 comparables together for this purpose and valued the Residence at \$330,000. The Court finds that
15 this valuation accurately reflects the value of the Residence on the Petition Date.

16 **IV. Conclusion**

17 This Memorandum Decision will serve as the Court's findings of fact and conclusions of
18 law under Bankruptcy Rule 7052.

19 For the reasons set forth above, the Court concludes Chase has not met its burden of
20 establishing the value of the Residence is \$350,000 and adopts the Debtor's valuation at \$330,000.
21 Therefore, Chase's lien is wholly unsecured by the Residence and may be stripped. The Debtor's
22 Lien Strip Motion is granted, and the Debtor's counsel is to submit the order in accordance with this
23 Memorandum Decision within ten days.

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25 IT IS SO ORDERED.

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27 DATED: 7/16/12

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MARGARET M. MANN, JUDGE
UNITED STATES BANKRUPTCY COURT