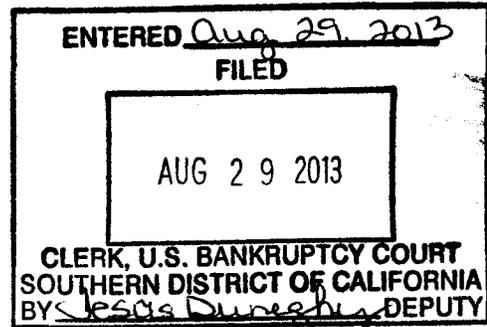


1                   **WRITTEN DECISION - NOT FOR PUBLICATION**



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11                   UNITED STATES BANKRUPTCY COURT

12                   SOUTHERN DISTRICT OF CALIFORNIA

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In re	)	Case No. 12-11194-LT13
	)	
RANDY D. McWHORTER,	)	ORDER ON MOTION TO
	)	VALUE REAL PROPERTY
Debtor.	)	
	)	
_____	)	

16                   This matter came on for evidentiary hearing on the debtor's

17 motion to value real property and avoid the junior liens of

18 Michael Hughes, Damon McGorey and Lucy Abernathy (Creditors).

19 The matter came to hearing from the court's special lien strip

20 calendar, where almost all such motions are considered regardless

21 of what judge is assigned to the case upon filing.

22                   Debtor's motion asserted that the subject property was

23 valued at \$524,000 as of August 2, 2012, based on an appraisal

24 and declaration of an appraiser. Debtor claimed that Bank of

25 America held the first position, and was owed \$612,585.30 as of

26 August 13, 2012, based on a proof of claim filed by the bank.

1 The second position debt and lien is held by Creditors, with a  
2 proof of claim on file in the amount of \$281,842.85. Debtor has  
3 indicated he disputes the amount the Creditors claim is due, but  
4 there is no need to address that issue at this point in time. If  
5 the Creditors' claim is secured by any amount of equity in the  
6 property, no part of that debt, whatever its amount, is avoidable  
7 in this process, because the subject property is debtor's  
8 principal residence. 11 U.S.C. § 1322(b)(2).

9 At the hearing, debtor testified he bought the property in  
10 October, 2005 and paid \$620,000 for it. He told the Court that  
11 he put about \$60,000 into remodeling it. In August, 2007 debtor,  
12 who was an active real estate agent at the time, listed the  
13 property for sale at \$975,000. Debtor listed the property again  
14 in 2008 at a price range of \$865,000 - \$895,000.

15 According to the Bank's amended proof of claim 6-2, in June,  
16 2012 debtor and the Bank agreed to modify the loan terms,  
17 pursuant to which the new principal balance was agreed to be  
18 \$613,324.09, \$350,000 of which was identified as "The Deferred  
19 Principal Balance" accrued no interest obligation but is all due  
20 and payable as a balloon payment at the end of the 280 month loan  
21 term. The "Interest Bearing Principal Balance" was agreed to be  
22 \$263,324.09, on which the monthly principal and interest, plus  
23 escrow payments was calculated. The new monthly payment under  
24 the loan modification commenced August 2, 2012. On August 13,  
25 2012 debtor filed this Chapter 13 case.

26 ///

1 Debtor filed the present motion to value the property on or  
2 about January 17, 2013. As already noted, debtor asserted the  
3 property's value was \$524,000, based on an appraisal and the  
4 appraiser's declaration. Creditors filed their Opposition, which  
5 included a declaration of an appraiser they employed, who valued  
6 the property at \$645,000 as of August 2, 2012. In their  
7 Opposition Creditors also raised an issue of whether the \$350,000  
8 "Deferred Principal Balance" should be included in calculation of  
9 the senior debt, and also whether debtor's Chapter 13 plan is  
10 proposed in good faith. The latter issue is a confirmation  
11 issue, to be decided by the originally assigned judge.

12 Concerning whether the "Deferred Principal Balance" should  
13 be included in the senior debt, Creditors have not suggested any  
14 reason why it is not. The matter has not been briefed by either  
15 side. The Court notes, in passing, that the loan modification  
16 agreement attached to the Bank's amended proof of claim 6-2 makes  
17 clear in paragraph 3, as follows:

- 18 A. ...The new principal balance of my Note will be  
19 \$613,324.09 (the "New Principal Balance")...
- 20 B. \$350,000 of the New Principal Balance shall be deferred  
21 (the "Deferred Principal Balance") and I will not pay  
22 interest or make monthly payments on this amount. The  
New Principal Balance, minus the Deferred Principal  
Balance shall be referred to as the "Interest Bearing  
Principal Balance" and this amount is \$263,324.09...

23 The total remaining principal balance that will be due in a  
24 balloon payment at the maturing of my loan will be the  
Deferred Principal Balance described in paragraph B above.  
25 This means that, even if I make all of the scheduled  
payments on time and comply with all the other terms of the  
26 modified loan agreement, a principal balance of \$350,000  
will remain unpaid at the time of the scheduled maturity

1 date. This balance will not accrue interest at the Note  
2 rate and is sometimes called a balloon payment. I will need  
3 to make arrangements to pay this remaining balance when I  
payoff my loan, when I transfer an interest in, refinance or  
sell the Property, or at maturity.

4 ...  
5 THE AMOUNT OF THE FINAL PAYMENT ON THIS LOAN, ASSUMING ALL  
6 SCHEDULED PRINCIPAL PAYMENTS ARE MADE IN ACCORDANCE WITH  
THIS MODIFICATION AGREEMENT, IS \$350,000.

7 As already mentioned, the Creditors have raised the question of  
8 how the \$350,000 "Deferred Principal Balance" is to be treated  
9 for purposes of calculating the amount of senior debt as of the  
10 petition date, August 13, 2012. Neither side had squarely  
11 addressed it in pleadings, and this Court will withhold any  
12 comment or conclusion until the parties have had the opportunity  
13 to do so.

14 When debtor filed the instant motion, it was supported by a  
15 declaration of an appraiser, and his appraisal opining that the  
16 value of the subject property was \$524,000 as of August 2, 2012.  
17 That appraiser did not testify at the evidentiary hearing, nor  
18 was his appraisal offered into evidence. Instead, debtor hired a  
19 different appraiser, whose report was timely provided to the  
20 Creditors. That appraisal was physically conducted April 8,  
21 2013, and adjusted to a date of value of August 12, 2012. His  
22 opinion of value is \$565,000, and he so testified. Aside from  
23 the street address of the subject property, there is little

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1 agreement between the testifying appraisers of the  
2 characteristics or qualities of the subject property, or the  
3 comparable sales they used to derive their opinions of value.

4 Debtor's testifying appraiser, Mr. Olsberg, described the  
5 property as a 2 bedroom 1 bath detached Craftsman style home.

6 Mr. Olsberg noted:

7 \*\* There is a [second] bathroom which is not included in the  
8 Realist.com public records indicating the likelihood of not  
9 being permitted. ... The bathroom adds some functional  
10 utility to the improvements, however, the seller would have  
11 to disclose the unpermitted bathroom. The resale market  
12 would most likely not pay additional money for the  
13 unpermitted bathroom. Based on this rationale, the  
14 appraiser is NOT assigning a value to the additional  
15 unpermitted bathroom.

16 Creditors' appraiser, Mr. Gillgren, testified that a permit was  
17 not required for such a bathroom until the 1950's, while the  
18 house was built in the 1920's. In his view, the second bathroom,  
19 including the shower, was functional and added value to the  
20 property.

21 A separate area of disagreement concerns the number of  
22 bedrooms. Both appraisers acknowledge that inside the home there  
23 are two bedrooms. Outside the home, however, there is a separate  
24 office of over 200 sq. ft. in space. When debtor listed the  
25 property in 2008, (Exhibit D), he listed it as an optional third  
26 bedroom, larger than either of the other two bedrooms. Mr.  
Olsberg recognized the existence of the office, but did not  
consider it a third bedroom.

The relevance of the number of bedrooms and bathrooms is  
reflected in the comparable sales each appraiser chose to use to

1 determine their respective opinion of value. Mr. Olsberg  
2 considered the subject property to be a 2 bedroom, 1 bath  
3 property, while Mr. Gillgren saw it as a 2 bedroom, 2 bath with a  
4 separate office. Mr. Olsberg chose 3 comps with two bedrooms and  
5 1 bath, and one with 2 bedrooms, 2 baths. Mr. Gillgren's comps  
6 included 4 that had 2 bedrooms and 2 baths, and 1 with 3 bedrooms  
7 and 1 bath. Interesting, both appraisers made adjustments of  
8 \$10,000 for a difference of 1 bathroom.

9 Mr. Olsberg used 2 comps that had a site size that is 1000  
10 sq. ft. smaller - 20% smaller than the subject - but made no  
11 adjustment at all. He said the office was well done and adjusted  
12 the subject upward by \$10,000, although it was a feature that  
13 none of the comps had. At the same time, Mr. Gillgren made the  
14 same adjustment, in the same amount on 3 of his comps. So the  
15 analysis distills down to the quality of the comps selected by  
16 each appraiser. Of the 5 listed by Mr. Olsberg, he eliminated  
17 no. 5 because it was erroneously included by computer error. His  
18 third comp involved a short sale rather than a market sale, and  
19 does not fit either appraisers' printed definition of market  
20 value. His fourth comp, although only .74 miles away, was  
21 located in a recognizably different neighborhood with a  
22 different, and lesser, community market appeal.

23 There was only one comparable sale selected by both  
24 appraisers, 4035 Randolph Street. It sold for \$655,000 on a  
25 contract written April 24, 2012 and closed May 31, 5 weeks later.  
26 It was only on the market for 10 days. The property site size

1 was 3999 sq. ft., while the subject is 5000 sq. ft., and it has 2  
2 bedrooms and 2 baths, while the subject also has the office or  
3 optional third bedroom. Both appraisers recognized that the comp  
4 had undergone a major remodel, which prompted Mr. Gillgren to  
5 make a \$30,000 adjustment, and Mr. Olsberg to make one of  
6 \$50,000. On top of that adjustment, Mr. Olsberg also made a -  
7 \$25,000 adjustment to the subject property for deferred  
8 maintenance. The Court finds the latter is redundant, and that  
9 \$40,000 is a reasonable adjustment for the superior renovation.  
10 Mr. Olsberg made no adjustment for the subject having a 20%  
11 larger, useable lot, while Mr. Gillgren made a \$15,000  
12 adjustment. The Court finds a \$10,000 adjustment to be  
13 reasonable. Both appraisers added \$10,000 to the value of the  
14 subject property for the office. Mr. Olsberg also added \$3,000  
15 to the subject because it has central air, while the Randolph  
16 Street comp does not. The remaining item of disagreement  
17 concerns the garage. Mr. Olsberg testified he saw the garage, but  
18 it was full of stuff. He said the flooring of the garage did not  
19 seem to support a car. Mr. Gillgren's report indicated there was  
20 a detached one car garage "that is not accessible for vehicles  
21 due to the placement of fencing and personal items." Mr.  
22 Gillgren made an adjustment of - \$5,000 to reflect a one car  
23 garage rather than the two car capacity of Randolph Street. Mr.

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1 Olsberg treated the subject as having no garage, so his  
2 adjustment was - \$10,000. For his other comps that had a one car  
3 garage, his adjustment was - \$5,000, like Mr. Gillgren's.

4 As a separate matter, Mr. Olsberg included a list of  
5 purported defects provided by the debtor, Mr. McWhorter, but Mr.  
6 Olsberg did not investigate or reach his own opinion concerning  
7 the items on the list. Mr. Gillgren was not provided a similar  
8 list, but did discuss with the debtor that the fireplace has an  
9 issue, and that there was a problem of a board in the living  
10 room. There was a dearth of evidence on the cost to make the  
11 repairs claimed to be needed, except for \$2,965 to relocate the  
12 water heater from the attic to outside. The Court also was made  
13 aware that in his 2008 listing for the subject property (Ex. D),  
14 the debtor stated in Supplemental Remarks: "1925 Lovingly  
15 Restored Dutch Craftsman. Completely restored in 2005. 2  
16 bedrooms, with 2 baths. Large Living Room w/fireplace. Dining  
17 Room with windows to garden, front porch...." The Court also  
18 recognized some amount of puffery is anticipated in a seller's  
19 listing for sale.

20 Based on the testimony, documentary evidence, and argument,  
21 and after careful review of the competing comparable sales, the  
22 Court finds the comparables selected by Mr. Gillgren to more  
23 closely approximate the subject property. The Court has reviewed  
24 the competing adjustments, and stated its own conclusions of what  
25 is reasonable. From all that information, the Court finds and  
26 concludes that the approximate value of the subject property,

1 4144 Eagle Street, as of August 13, 2012 was \$630,000.

2 Accordingly, debtor's motion to avoid the second position  
3 lien and trust deed is denied. Whether the third position lien  
4 and trust deed is avoidable depends on whether the judge assigned  
5 this case concludes that the "Deferred Principal Balance" is a  
6 component of the senior debt as of August 13, 2012, or not, an  
7 issue on which this Court expresses no opinion because no party  
8 has put it into a posture for decision.

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IT IS SO ORDERED.

DATED: AUG 29 2013



PETER W. BOWIE, Judge  
United States Bankruptcy Court