

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

BETTY ANN DUBOSE,

Debtor.

CASE NUMBER 02-45763

BETTY ANN DUBOSE,

Plaintiff,

vs.

ADVERSARY NUMBER 03-4443

BANK ONE, N.A.,

Defendant.

M E M O R A N D U M O P I N I O N

This matter came on for trial on September 29, 2004. Debtor/Plaintiff, Betty Ann Dubose ("Ms. Dubose"), was represented by Robert A. Ciotola, Esq. Geoffrey E. Albrecht, Esq. appeared and stated that he had filed an answer on behalf of Defendant, Bank One, N.A. ("Bank One"), through the law firm of Weinstein, Treiger & Riley, P.S. (the "Weinstein Law Firm") on or about November 11, 2003 in response to the complaint that was filed on October 14, 2003. Mr. Albrecht stated, however, that he had learned, at approximately 4:00 p.m. on September 28, 2004, that the Weinstein Law Firm did not represent Bank One in this

adversary proceeding, although it gener-ally represented Bank One as a client. Accordingly, Mr. Albrecht stated that he, through the Weinstein Law Firm, did not represent Bank One, and he requested that he be allowed to withdraw as counsel of record. Mr. Albrecht further requested a continuance of the trial in order to allow time for Bank One to properly obtain counsel and defend itself.

Bank One did not otherwise appear at the trial. Accord-ingly, this Court denied Mr. Albrecht's request to withdraw as counsel. Based upon statements of Ms. Dubose's counsel that further delay would prejudice Ms. Dubose, whose counsel was present and who had spent money to obtain an appraisal and to obtain the appearance of the appraiser as a witness at the pending trial, the Court denied Mr. Albrecht's request for a continuance. The Court noted that, to the extent there was any confusion about Bank One's representation, it was not precipitated by anything that Ms. Dubose had done, and appeared to be a problem between Bank One and the Weinstein Law Firm. Mr. Ciotola stated that Bank One had been served at the address listed on its proof of claim and it appeared that Bank One had properly been served with the complaint. Accordingly, either the answer of Bank One filed on November 11, 2003 was authorized and is a valid answer on behalf of Bank One or, if not so authorized, Bank One is in default. The Court proceeded as if

the November 11, 2003 answer of Bank One was authorized.

This adversary proceeding is an action to avoid a second mortgage under 11 U.S.C. § 506(a). This is a core proceeding pursuant to 28 U.S.C. § 157. The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

Ms. Dubose presented one witness, Anthony O.J. Thomas, who is a general certified appraiser, with 20 years' appraisal experience. Mr. Thomas testified that, based on an appraisal dated August 3, 2003, Ms. Dubose's real property located at 240 Norwood Avenue, Youngstown, Ohio 44504 (the "Real Property"), had a value of Twenty Thousand Dollars (\$20,000.00). Mr. Thomas testified that he used a comparable sales approach for the appraisal. He further testified that there were 29 houses within a half-mile radius of the Real Property that had been sold in the prior year. He stated that, based on the age of the structure, the square footage, and the condition, he found three of the 29 houses that were comparable to the Real Property. He further testified that he put information about the three comparable sales on a grid and made positive or negative adjustments. Mr. Thomas stated that the 29 subjects ranged in price from Two Thousand Dollars (\$2,000.00) to Thirty Thousand Dollars (\$30,000.00), with one sale at Sixty Thousand Dollars (\$60,000.00) that was a "rehab house" that was not similar to the

Real Property.

Mr. Thomas further stated that the Mahoning County Audi-tor's Office had valued the Real Property at Twenty-Two Thousand Three Hundred Dollars (\$22,300.00) in or about 2000. Of the 29 sales, Mr. Thomas testified that three exceeded Thirty Thousand Dollars (\$30,000.00), and one additional property exceeded Twenty-Five Thousand Dollars (\$25,000.00). Mr. Thomas stated that defects in the Real Property included (i) stained hardwood floors in the living room and dining room that needed to be refinished, (ii) worn and stained carpeting, and (iii) the roof was curling, but not leaking.

On cross examination, Mr. Thomas conceded that, based upon the Mahoning County Auditor's records, Ms. Dubose had purchased the Real Property on March 31, 2000 and that such sale was deemed to be "valid" pursuant to such records. Mr. Thomas testified that a "valid" sale generally meant that it was an arms-length transaction. The record indicated that Ms. Dubose purchased the Real Property on March 31, 2000 for a purchase price of Thirty-Three Thousand Nine Hundred Dollars (\$33,900.00). Mr. Thomas also conceded that appraising was not an exact science, but is based on educated opinion.

Ms. Dubose also submitted into evidence Claim # 5, dated February 20, 2003, filed by CitiMortgage, Inc. in the amount of Twenty-Four Thousand Three Hundred Thirty-Four and

85/100 Dollars (\$24,334.85), and Claim # 3, dated January 17, 2003, filed by Bank One in the amount of Six Thousand Eight Hundred Sixty-One and 36/100 Dollars (\$6,861.36). CitiMortgage's claim is based upon a first mortgage on the Real Property and Bank One's claim is based upon a second mortgage on the Real Property.

Mr. Albrecht did not present any witnesses or other evidence. He argued, however, that Ms. Dubose had paid Thirty-Three Thousand Nine Hundred Dollars (\$33,900.00) for the Real Property in the year 2000, and that no information or evidence had been adduced to indicate any reason for the value of the Real Property to decrease by more than Thirteen Thousand Dollars (\$13,000.00) in a short period of time. He further argued that Ms. Dubose had obviously thought the Real Property was worth Thirty-Three Thousand Nine Hundred Dollars (\$33,900.00) at the time she purchased it in the year 2000 or she would not have done so. He pointed out that the appraiser had noted that there were problems with the hardwood floors and carpeting, but had not identified any structural defects.

Based upon the entire record, this Court finds that the value of the Real Property is Twenty-Two Thousand Three Hundred Dollars (\$22,300.00), which is the amount of the appraisal set forth in the Mahoning County Auditor's Office. This was also the amount that Ms. Dubose had scheduled the Real Property in her

petition and the amount set forth in Ms. Dubose's complaint. The appraisal testimony, although somewhat less than Twenty-Two Thousand Three Hundred Dollars (\$22,300.00), is consistent with this Court's findings. Although there was no affirmative evidence presented to indicate a reason for a decline in value of the Real Property from the purchase price in the year 2000 of Thirty-Three Thousand Nine Hundred Dollars (\$33,900.00) to the value of the Real Property as found by the Court (*i.e.* Twenty-Two Thousand Three Hundred Dollars (\$22,300.00)), Bank One failed to offer an appraisal of its own and also did not inquire of either Ms. Dubose or Mr. Thomas whether any event had taken place that would cause a decline in value.

Accordingly, because the value of the Real Property is less than the first mortgage, Bank One's claim has a secured value of Zero Dollars (\$0) and an unsecured value at Six Thousand Eight Hundred Sixty-One and 36/100 Dollars (\$6,861.36).

An appropriate order shall enter.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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O R D E R

For the reasons set forth in this Court's memorandum opinion entered this date, the Court concludes Bank One's claim has a secured value of Zero Dollars (\$0) and an unsecured value at Six Thousand Eight Hundred Sixty-One and 36/100 Dollars (\$6,861.36) because the value of the Real Property is less than the value of the first mortgage. The second mortgage is avoided under 11 U.S.C. § 506(a).

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
Memorandum Opinion and Order were placed in the United States

Mail this ____ day of October, 2004, addressed to:

BETTY ANN DUBOSE, 240 Norwood Avenue,
Youngstown, OH 44504.

ROBERT A. CIOTOLA, ESQ., 4590 Boardman-
Canfield Road, Suite B, Canfield, OH 44406.

GEOFFREY E. ALBRECHT, ESQ., 673 S. Mohawk
Street, Suite 203, Columbus, OH 43206.

BANK ONE, N.A., Attn: Bankruptcy Department,
P. O. Box 626, Butler, WI 53007.

BANK ONE, N.A., National Payment Services,
P. O. Box 182223, Columbus, OH 43218.

WEINSTEIN, TREIGER & RILEY, P.S., 2101 Fourth
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MICHAEL A. GALLO, ESQ., 20 Federal Plaza
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JOANNA M. ARMSTRONG