Dated: February 06 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 05-72230
	)	
Edward P. Calvin and	)	Chapter 7
Kristina M. Calvin,	)	
	)	
Debtors.	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER DENYING MOTION TO AVOID A LIEN ON REAL ESTATE

This matter is before the court on Debtors' Motion to Avoid a Lien on Real Estate [Doc. # 10]. Debtors seek to avoid a second mortgage on their home that is held by Homecomings Financial in the amount of $31,977.67, alleging that it is totally unsecured. Homecomings Financial was served with the instant motion and has not filed an objection.[1] Nevertheless, a default judgment is not granted as a matter of right. *Webster v. Key Bank (In re Webster)*, 287 B.R. 703, 709 (Bankr. N.D. Ohio 2002). The court must determine whether the allegations in the motion support the relief sought. *Ryan v. Homecomings Financial Network*, 253 F.3d 778, 780 (4th Cir. 2001). For the reasons that follow, the court concludes that Debtors are not entitled to the requested relief and the motion will, therefore, be DENIED.

Debtors listed their residence in their bankruptcy Schedule A as real estate owned by them with a

[1] This matter arguably should have been brought as an adversary proceeding under Federal Rule of Bankruptcy Procedure 7001(2), which provides that "a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d)" is an adversary proceeding. Rule 4003(d), allowing lien avoidance by motion, by its terms applies only to 11 U.S.C. § 522(f), which is inapplicable to a consensual lien on real property.

market value of $31,977.67. In their Schedule D, they list a first mortgage debt owed to NOIC in the amount of $51,477.67 and a second mortgage debt owed to Homecomings Financial in the amount of $31,977.67. Debtors seek to avoid or "strip off" the second mortgage debt, relying on 11 U.S.C. § 506(a), which provides as follows:[2]

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

Section 506(a), however, confers no avoidance powers on a Chapter 7 debtor. *Talbert v. City Mortgage Servs. (In re Talbert),* 344 F.3d 555, 562 (6th Cir. 2003). Nor does § 506(d) confer such powers, which subsection, although not specifically cited by Debtors in this case, provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void. . . ." 11 U.S.C. § 506(d); *Talbert*, 344 F.3d at 562.

In *Talbert*, the court was faced with facts similar to those presented in the instant motion. The debtors' residence was encumbered by both a first mortgage that exceeded the value of the property and a second mortgage. As in this case, the debtors sought to strip off the second mortgage. The debtors in *Talbert* argued that the secured status of a claim is determined by the security-reducing provision of § 506(a), and that pursuant to this provision, their junior lien was completely unsecured and, according to § 506(d) may be stripped off. *Id.* at 558. The court rejected this argument, relying on the statutory interpretation and analysis set forth in *Dewsnup v. Timm*, 502 U.S. 410 (1992).

In *Dewsnup,* the Supreme Court held that a Chapter 7 debtor could not "strip down" a lien that was undersecured. The court concluded that "allowed secured claim" in § 506(d) should not be defined by reference to § 506(a) but "should be read term-by-term to refer to any claim that is, first, allowed, and second, secured." *Dewsnup*, 502 U.S. at 415. Thus, the Court held that "§ 506(d) does not allow petitioner to 'strip down' respondent's lien, because respondents' claim is secured by a lien and has been fully allowed

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[2] Section 506 was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005("BAPCPA" or "the Act"), effective October 17, 2005. However, Debtors' bankruptcy case was filed before the effective date the Act. Therefore, all references to the Bankruptcy Code in this opinion are to the pre-BAPCPA version of the Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title XV, § 1501(b)(1) (stating that, unless otherwise provided, the amendments do not apply to cases commenced under Title 11 before the effective date of the Act).

pursuant to § 502." *Id.* at 417.

The Sixth Circuit identified three considerations which it found were the "analytical underpinnings" of the Supreme Court's holding: "(1) any increase in the value of the property from the date of the judicially determined valuation to the time of the foreclosure sale should accrue to the creditor; (2) the mortgagor and mortgagee bargained that a consensual lien would remain with the property until foreclosure; and (3) liens on real property survive bankruptcy unaffected." *Talbert*, 344 F.3d at 559 (citing *Dewsnup*, 502 U.S. at 417-18). Although *Dewsnup* involved a debtor's attempt to *strip down* an undersecured loan, the Sixth Circuit found the Supreme Court's reasoning equally applicable to a debtor's attempt to *strip off* a totally unsecured loan, explaining as follows:

> As in the case of a "strip down," to permit a "strip off" would mark a departure from the pre-Code rule that real property liens emerge from bankruptcy unaffected. Also, as in the case of a "strip down," a "strip off" would rob the mortgagee of the bargain it struck with the mortgagor, i.e., that the consensual lien would remain with the property until foreclosure. In fact, in *Dewsnup*, the Court was persuaded by the creditors' argument that " 'the fresh start' policy cannot justify an impairment of respondents' property rights, for the fresh start does not extend to an in rem claim against property but is limited to a discharge of personal liability." 502 U.S. at 416, 112 S. Ct. 773. Finally, as was true in the context of "strip downs," Chapter 7 "strip offs" also carry the risk of a "windfall" to the debtors should the value of the encumbered property increase by the time of the foreclosure sale.

Id. at 561. The Sixth Circuit concluded that "'[s]ection 506 was intended to facilitate valuation and disposition of property in the reorganization chapters of the code, not to confer an additional avoiding power on a Chapter 7 debtor'" and that "[w]hen a debtor proceeds under Chapter 7, creditors are 'entitled to their lien position until foreclosure or other permissible final disposition is had.'" *Id.* at 562 (quoting *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 783 (4th Cir. 2001).[3]

The facts of this case are indistinguishable from those in *Talbert.* Applying *Talbert*, the court concludes that Debtors are not entitled to strip off the second mortgage on their residence.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Debtors' Motion to Avoid Lien on Real Estate be, and hereby is, **DENIED.**

[3]Assuming the facts asserted by Debtors to be true, the result would be different in the Sixth Circuit if this were a Chapter 13 case instead of a Chapter 7 case. *Lane v. Western Interstate Bancorp (In re Lane)*, 280 F.3d 663, 669 (6th Cir. 2002).