

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JOHN COLEMAN, JR. AND
TANESHA COLEMAN,

Debtors.

CASE NUMBER 05-44005

JOHN COLEMAN, et al.

Plaintiffs,

vs.

CITIFINANCIAL,

Defendant.

ADVERSARY NUMBER 06-4032

THE HONORABLE KAY WOODS

M E M O R A N D U M O P I N I O N
(NOT INTENDED FOR NATIONAL PUBLICATION)

The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is

available for electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause came before the Court for a bench trial on March 27, 2007. Plaintiffs/Debtors John Coleman Jr. and Tanesha Coleman ("Plaintiffs") were present and represented by Bruce R. Epstein, Esq. Defendant Citifinancial ("Defendant") was represented by Frederick S. Coombs, III, Esq. The Court received the testimony of Morris M. Levy and Carol A. Sole.

In their Adversary Complaint, Plaintiffs seek to avoid a junior mortgage on their principal residence, which they contend is wholly unsecured. Defendant counters that the fair market value of the real estate exceeds the amount owed by Plaintiffs on the first mortgage, and, as a consequence, Defendant's claim is fully secured.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. Law

11 U.S.C. § 1322(b)(2) expressly provides that a Chapter 13 bankruptcy plan may modify the rights of holders of "unsecured claims." 11 U.S.C. § 1322 (West 2006). This section further provides that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence...." *Id.*

Whether a claim is "secured" or "unsecured" depends on whether the lienholder's interest in the collateral has economic value. See 11 U.S.C. § 506(a). "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." *Id.*

"The legislative history emphasizes that § 506(a) provides a flexible, rather than static, approach to valuation." *McClurkin v. Pees (In re McClurkin)*, 31 F.3d 401, 403 (6th Cir. 1994). Courts rely on the fair market value of real estate in assessing the secured nature of claims under § 506. *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106 (1993).

Where a creditor holds a second mortgage on a principle residence valued at less than the debtor's secured obligation to a first mortgagee, the holder of the second mortgage has only an unsecured claim for § 506(a) purposes. 11 U.S.C. § 506 (a). On the other hand, if a lien is merely undersecured, that is, if the second mortgagee's claim has a secured component and an unsecured component, the lien is not subject to modification, *Nobelman v. American Savings Bank, supra*, unless the last payment under the original payment schedule is due before the final payment under the plan. *First Union Mortgage Corp. v. Eubanks (In re Eubanks)*, 219 B.R. 486 (B.A.P. 6th Cir. 1998)(interpreting 11 U.S.C. § 1322(c)(2)).

I. Facts

The following facts are taken from the stipulations filed on behalf of both parties unless otherwise noted. Plaintiffs are the

title holders of residential real estate located at 436 W. Midlothian Boulevard, Youngstown, Ohio ("subject property"). Citimortgage holds a first mortgage in the subject property in the amount of \$71,851.77. Defendant holds a perfected junior mortgage in the amount of \$6,456.67.

At trial, Plaintiffs offered the testimony of Morris M. Levy, a state certified real estate appraiser, who valued the subject property at \$70,000.00. Defendant offered the testimony of Carol A. Sole, a real estate agent, who valued the subject property at \$75,000.00 (based upon a 30-day quick sale) and \$82,500.00 (based upon an extended sale).

III. Analysis

The secured nature of Defendant's lien, which is the sole issue presented in this adversary case, turns completely on the fair market value of the subject property. Accordingly, this Court shall examine the appraisals and the testimony provided by each witness, as well as their credentials and methodologies, in order to determine whether the value of the subject property exceeds \$71,851.77.

Mr. Levy testified that he has been a residential real estate appraiser since 1977 and that he is currently certified by the State of Ohio to appraise property valued in excess of \$1,000,000.00.¹ Mr. Levy further testified that he employed standards endorsed by the American Institute of Real Estate

¹On cross-examination, Mr. Levy admitted that he has been a candidate for membership in the National Association of Realtors for twenty years, but has not "submitted his completed narrative report." However, because Defendant failed to elicit the significance of this fact, the Court will not consider it in assessing Mr. Levy's credentials.

Appraisers in calculating the value of the subject property and that his appraisal is premised upon a sales comparison analysis and a cost approach.

For purposes of appraising the subject property, Mr. Levy utilized a real estate search computer program called "Real Quest." By inputting the location and characteristics of the subject property, Mr. Levy used the program to generate a list of the twenty most similar properties in the same part of the city.² He then manually reduced the list of similar properties to ten and put that data into a second computer program, which provides a direct comparison of the subject property with the selected Real Quest-generated properties.

Based upon the foregoing information and his many years of experience appraising real estate, Mr. Levy personally analyzed the data, circumscribed by the value that occurred most often among the Real Quest-generated properties (the modal value) in order to further narrow the list of comparable properties.³ Ultimately, Mr. Levy chose 273 East Midlothian, 412 West Midlothian, and 484 Mistletoe Avenue as the three most comparable properties.⁴ The sale prices of the West Midlothian and Mistletoe Avenue properties

²Mr. Levy testified that Real Quest searches all sales in the county that occurred one year prior to the appraisal date. Based upon instructions from Plaintiffs' counsel, he used April 2005 to April 2006 for the period of his search.

³Mr. Levy testified that the sales prices ranged from \$55,000.00 to \$80,000.00 after he had reduced the number of comparable properties to six. However, on cross-examination, Mr. Levy explained that if the \$80,000.00 property was the property which was most similar to the subject property, he would have adjusted his approach in order to search for like properties in the higher value range.

⁴Fannie Mae, which is the controlling agency for residential real estate appraising in the United States, requires selection of three properties for a comparable sales analysis.

were \$69,900.00 and \$69,140.00 respectively. The sales price of the East Midlothian property was \$76,500.00.

Because it is virtually impossible to find identical properties, Mr. Levy testified that he made certain adjustments to the comparable properties based upon a "matched pair analysis." Essentially, he compared two like properties (from the original twenty properties generated by the Real Quest search) with one distinct attribute, *i.e.* central air conditioning, and relied on the difference in price to assign value to that attribute. The adjusted sale prices of the West Midlothian and Mistletoe Avenue properties were \$69,910.00 and \$67,290.00 respectively. The adjusted sales price of the East Midlothian property was \$71,830.00. Mr. Levy then valued the subject property at \$69,900.00.

When defense counsel asked whether the real estate located on W. Midlothian should be attributed greater value based upon its proximity to the suburb of Boardman, Mr. Levy explained that E. Midlothian was actually considered a superior location prior to the merger of the South High School and Wilson High School districts. However, as a result of the merger of the two school districts, Mr. Levy testified that the entire south side of Youngstown has become "one psychological neighborhood."

Ms. Sole is a self-employed real estate agent, but she is not a real estate appraiser. She conducted a comparative market analysis based upon a list of sold or active properties within a half mile radius of the subject property at the time of the appraisal. Ms Sole used a real estate search computer program

called CRIS/MLS ("CRIS")⁵ to enter the location and the style of the subject property. The computer program then generated eleven properties that she then analyzed in a "3-Up Comparison Report."⁶

In her analysis, Ms. Sole considered the list prices (*i.e.*, the seller's asking price) for five of the CRIS-generated properties that had not sold as of the date of her appraisal, and the purchase prices for the remaining six CRIS-generated properties. Two of the list prices considered by Ms. Sole were less than \$70,000.00 and the other three were listed at \$79,900.00, \$74,900.00, and \$71,900.00. The purchase prices for the remaining six properties ranged from 59,900.00 to \$91,750.00.

The lion's share of Ms. Sole's direct testimony focused on the property at 320 W. Midlothian, which sold for \$82,500.00 on June 8, 2006. Because the 320 W. Midlothian property had a number of features that made it superior to the subject property, Defendant engaged in a "matched pair analysis" thereby reducing the value of the 320 W. Midlothian property to \$77,500.00.

Defendant argued that the sale of 320 W. Midlothian was close in time,⁷ close in design, and close in proximity to the subject property, but that Mr. Levy did not include 320 W. Midlothian in his analysis because the value of the real property was outside the arbitrary parameters he had set for the subject property. Based solely upon the value of the 320 W. Midlothian property, and,

⁵Mr. Levy testified that CRIS, which is supplied by the Youngstown Area Board of Realtors, only searches real estate listed and sold by Realtors.

⁶A "3-Up Comparison Report" compares the various features of three houses side-by-side on a single-page report.

⁷Plaintiffs filed their Chapter 13 case and proposed plan on July 8, 2005 - eleven months prior to the sale of 320 W. Midlothian.

incidentally, ignoring the other comparable sale and list prices generated by Ms. Sole's CRIS search, Defendant argued that the value of the subject property was \$74,000.00 to \$75,000.00.

However, on cross examination, Ms. Sole conceded that two of the comparable sales generated by CRIS were located in Boardman rather than Youngstown, where the subject property is located.⁸ Furthermore, three of the comparable Youngstown property sales were purchased for \$69,900.00, \$61,900.00, and \$51,900.00. Another comparable property located on W. Midlothian, which was listed at \$71,900.00, had not sold despite being on the market at that asking price since December 2005. Finally, Ms. Sole acknowledged that she had not considered (i) a property at 4020 Helena, which was listed on September 22, 2006 with an asking price of \$74,900.00 and was purchased by the current owners in June 2005 for \$69,000.00, or (ii) a property at 3716 Glenwood, with a list price of \$79,900.00, which sold on August 1, 2006 for \$70,000.00.⁹

Ms. Sole attempted to dismiss the difference in the foregoing list prices (which favor Defendant's appraisal of the subject property) and sales prices (which favor Plaintiffs' appraisal of the subject property) as anomalies that may have resulted from circumstances such as bank repossessions, foreclosures, and relocations.¹⁰ However, based upon all of the evidence before the Court, it appears that the anomaly among Ms. Sole's comparable

⁸The comparable properties in Boardman sold for \$91,750.00 and 74,000.00.

⁹The sales prices propounded by counsel for Plaintiffs are available at www.mahoningcountyauditor.org.

¹⁰Ms. Sole conceded, however, that she did not know the circumstances of any of the sales in question.

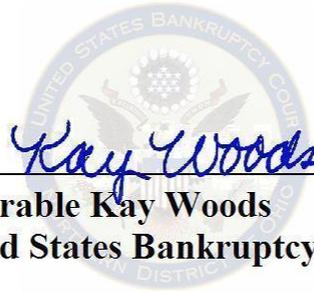
properties is 320 W. Midlothian. The remainder of Ms. Sole's comparable properties located in Youngstown sold at or below the \$70,000.00 mark advocated by Mr. Levy, and, as a consequence, are entirely consistent with Mr. Levy's appraisal of the subject property.

Accordingly, the Court finds that the subject property has a fair market value of \$70,000.00. Because the value of the subject property is less than the value of the first mortgage held by Citimortgage, Defendant's junior mortgage is wholly unsecured and, therefore, shall be treated as a general unsecured claim in the amount of \$6,456.67.

An appropriate order will follow.

#

IT IS SO ORDERED.



Dated: April 09, 2007
03:43:28 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JOHN COLEMAN, JR. AND
TANESHA COLEMAN,

Debtors.

CASE NUMBER 05-44005

JOHN COLEMAN, et al.

Plaintiffs,

vs.

CITIFINANCIAL,

Defendant.

ADVERSARY NUMBER 06-4032

THE HONORABLE KAY WOODS

O R D E R

This cause came before the Court for a bench trial on March 27, 2007. The Court finds that 436 W. Midlothian Boulevard, Youngstown, Ohio has a fair market value of \$70,000.00. The value of the residential real estate is less than the value of the first mortgage held by Citimortgage. As a consequence, the junior

mortgage held by Defendant Citifinancial is wholly unsecured and, therefore, shall be treated as a general unsecured claim in the amount of \$6,456.67.

#