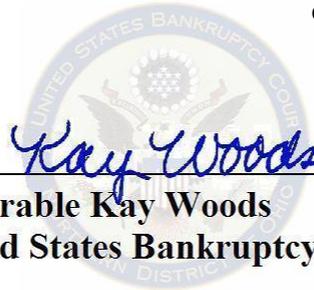


IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
JAMES M. MASIROVITS and	*	CASE NUMBER 07-43216
KIMBERLY A. MASIROVITS,	*	
	*	
Debtors.	*	
	*	

JAMES M. MASIROVITS and	*	
KIMBERLY A. MASIROVITS,	*	
	*	ADVERSARY NUMBER 07-04177
Plaintiffs,	*	
	*	
vs.	*	CHAPTER 13
	*	
GEAUGA SAVINGS BANK	*	
	*	
and	*	HONORABLE KAY WOODS
	*	
VALLEY BUILDING CENTER, INC.	*	
	*	
Defendants.	*	
	*	

MEMORANDUM OPINION REGARDING VALIDITY OF LIENS

This cause came before the Court for a bench trial on December 1, 2008. Plaintiffs/Debtors Kimberly A. Masirovits ("Mrs. Masirovits") and James M. Masirovitis (collectively,

"Debtors") were present and represented by George A. Vince, Jr., Esq. Defendants Geauga Savings Bank ("Gauga") and Valley Building Center ("Valley") (collectively, "Defendants") were represented by Anthony A. Cox, Esq., and Mark A. Beatrice, Esq., respectively.

In their Adversary Complaint, Debtors seek to avoid two junior mortgages ("Junior Mortgages") on their principal residence ("Residence"), which they contend are wholly unsecured. Defendants (i) counter that the fair market value of the Residence exceeds the amount owed by Debtors on the first mortgage, but (ii) disagree about the order of priority for the Junior Mortgages.

Debtors filed their voluntary chapter 13 petition on December 18, 2007 ("Petition Date"), and commenced this adversary proceeding on December 22, 2007, by filing Complaint to Determine Secured Status of Claims and to Void Liens to Extent They Secure Claims Which Are Not Allowed Secured Claims (Avoidance of Wholly Unsecured Junior Mortgages) (Doc. # 1). Gauga filed Answer of Gauga Savings Bank (Doc. # 9) on January 25, 2008. Valley filed (i) Answer (Doc. # 10) on January 28, 2008, and (ii) Trial Brief of Valley Building Center, Inc. (Doc. # 33) on November 26, 2008.

Prior to trial, on November 26, 2008, all parties jointly submitted a Stipulation (Doc. # 34), which set forth stipulated facts in five numbered paragraphs and to which was attached Judgment Entry of Foreclosure, dated October 10, 2007, on the Residence. At trial, the Court (i) received the testimony of Mrs. Masirovits, David Korb ("Mr. Korb"), and Dennis Huey ("Mr. Huey"); and (ii) admitted into evidence Debtors' Exhibit A, Valley's Exhibits 1

and 2, and Geauga's Exhibits 1-5. Based on the aforementioned pleadings, testimony, and exhibits, the Court finds that (i) the Residence had a fair market value of \$227,000.00 as of the Petition Date; (ii) Geauga holds the first and second mortgages, while Valley's mortgage is third in priority; (iii) all three mortgages are secured; and, therefore, (iv) Debtors may avoid none of the mortgage liens.

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. Facts

Debtors are the title holders of the Residence, which is located at 1038 Holcomb Road, Jefferson, Ashtabula County, Ohio. (Stip. ¶ 1). Geauga holds two mortgage liens against the Residence, both filed with the Ashtabula County Recorder's Office on October 25, 2004. (Stip. ¶¶ 2 and 4). As of the Petition Date, the balance on Geauga's senior lien was \$191,216.77, and the balance on its junior lien was \$18,728.59. (Stip. ¶¶ 2 and 4). Valley holds a mortgage lien on the Residence, which was filed with the Ashtabula County Recorder's Office on July 11, 2005. (Stip. ¶ 3). The balance of Valley's mortgage as of the Petition Date was \$37,165.85. (*Id.*)

Valley filed a foreclosure action against the Residence in the

Ashtabula Common Pleas Court ("State Court"). (Stip. ¶ 5). On October 10, 2007, the State Court entered a Judgment Entry of Foreclosure ("State Court Judgment"). (*Id.*)

At trial, Debtors offered the testimony of David Korb, a certified property appraiser, who valued the Residence at \$180,000.00 as of July 28, 2008. Valley offered the testimony of Dennis Huey, a licensed residential appraiser, who valued the Residence at \$227,000.00 as of March 8, 2008. Geauga did not offer any valuation testimony.

Both appraisers inspected the Residence, noting (i) that the propane-fueled radiant floor heating system was not functioning properly; (ii) an unidentified black substance on the ceiling of the basement; and (iii) discoloration on the wooden window casings. Mr. Korb also noted that some of the window weather stripping was damaged. Both appraisers conducted comparison sales analyses using recent sales of five other residences in the same general geographic area as the Residence.¹ Two of the "comparables" were used by both appraisers.

II. Analysis

A. Valuation of Residence

11 U.S.C. § 1322(b)(2) allows a chapter 13 debtor to modify the rights of an unsecured creditor. 11 U.S.C. § 1322 (West 2008). "The Sixth Circuit has held . . . that debtors may 'strip off' mortgages that are totally unsecured by virtue of there being no

¹Mr. Huey also used a cost approach analysis as a secondary method, which valued the Residence at \$233,309.00.

equity over and above prior encumbrances." *In re Farthing*, 2005 Bankr. LEXIS 97, *3-4 (Bankr. E.D. Ky 2005) (citing *Lane v. W. Interstate Bankcorp (In re Lane)*, 280 F.3d 663 (6th Cir. 2002)). In the instant case, Debtors seek to avoid the Junior Mortgages, on the grounds that the Junior Mortgages are wholly unsecured. Therefore, the Court's first task is to determine if the Junior Mortgages are secured.

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)(1). "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." *Huntington Nat'l Bank 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. See, e.g., *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 113 S.Ct. 2106 (1993). See also, *In re McCoy*, 2005 Bankr. LEXIS 1796, *4 (Bankr. N.D. Ind. 2005) ("Because under his plan, [Debtor] proposes to retain the property, the applicable valuation standard is 'fair market value[.]'").

Whether Defendants' liens are secured turns completely on the

fair market value of the Residence. Accordingly, this Court examined the appraisals and the testimony provided by each expert witness, as well as their credentials and methodologies, in order to determine the value of the Residence. Taken as a whole, the Court finds the testimony and appraisal of Mr. Huey to be more credible.

First, Mr. Huey's credentials are clear. He testified that he has (i) an associate's degree in finance with a minor in accounting from Kent State University; (ii) been a residential real estate appraiser since 1976, when he took all courses required by the Appraisal Institute as necessary for residential real-estate appraising; (iii) taken two continuing education courses in his field each year since 1976; and (iv) been licensed by the State of Ohio since 1991. (Trans. at 2:32:58). He further testified that he has been a full-time appraiser since 1987, conducting approximately 200 appraisals annually, mostly in Ashtabula County. (Trans. at 2:33:28).

Mr. Korb's credentials are less clear. He testified that he "completed schooling through various schools, colleges" without indicating which schools or if he had earned any degrees. (Trans. at 1:44:00). He further testified that he is "certified" as opposed to "licensed." (Trans. at 1:44:30). Mr. Korb defined "certified" as being able to value 1-4 family unit dwellings and "licensed" as being able to appraise transactions valued at up to \$1,000,000.00. (Trans. at 1:44:40). Somewhat confusingly, when Debtors' counsel followed up by asking if an appraiser who is certified could

"appraise higher values," Mr. Korb answered "yes." (Trans. at 1:44:57). Mr. Korb offered no testimony concerning how long he has been an appraiser, how many appraisals he has done, or if he specializes by either property type or geographic area.

Second, Mr. Huey used both the sales analysis and the cost methods in calculating the value of the Residence. Mr. Huey indicated that using both approaches for newer homes provides a "cross reference" for the appraiser because it is difficult to evaluate loss in value to a new home. (Trans. at 3:09:14). In contrast, Mr. Korb testified that while he uses the cost method for newer houses "usually, in a different type of mortgage appraising," he stated that he believed it "wasn't needed" here because of the condition of the Residence, and that "it wasn't a credible issue." (Trans. at 2:06:50). Mr. Korb further testified that his decision to use or not use the cost approach "is determined by the assignment itself." (Trans. at 2:12:00).

Third, Mr. Huey's selected comparables appear to be closer in size and amenities to those of the Residence than those selected by Mr. Korb. Two of Mr. Korb's comparables were significantly smaller than the Residence, and only one of his five comparables had a market value greater than \$200,000.00. (Debtors Ex. A at unnumbered 3 & 5). Mr. Huey described the Residence as a "step above standard" (Trans. at 2:38:40), with "custom" features (Trans. at 2:40:10), while Mr. Korb said he considered it just a "ranch style dwelling" (Trans. at 1:50:00). The descriptions of both appraisers, together with the photos in their appraisals, indicate that the Residence has

markedly more amenities than a standard suburban ranch home. The Residence, which sits on more than five acres of land, has (i) more than 2,000² square feet of finished living space, together with a full unfinished basement; (ii) cathedral ceilings with corresponding exterior gables; (iii) triangular windows; (v) hickory kitchen cabinets; and (iv) truss-type floor joists.

When asked on cross-examination if these features of the Residence distinguished it from houses lacking those items, Mr. Korb responded, "No, sometimes it does, sometimes it doesn't." (Trans. at 1:50:15). He then went on to testify that that these features did not distinguish the Residence because some the comparables had similar features. (Trans. at 1:50:30). When pressed for specifics, Mr. Korb simply replied, "I'm pretty sure that most of the comparables had their own little features." (Trans. at 1:50:53). However, only one of Mr. Korb's comparables had more than 2,000 square feet of living space; two of them (## 2 & 3) lacked any basement; and two of them (## 4 & 5) had less than half the acreage of the Residence. Photos of the comparables in Mr. Korb's appraisal illustrate that four of the comparables (## 2 - 5) lacked the unusual windowed gables that distinguish the Residence.

Fourth, Mr. Huey's adjustments in comparing the Residence with recent residential sales appear to be more case-specific than those of Mr. Korb. Mr. Huey testified that he took the deficiencies of

²Mr. Korb's appraisal states that the square footage is 2,146, while Mr. Huey's appraisal lists the square footage at 2,480, plus an additional 2,312 square feet of unfinished basement.

the Residence into consideration, and indeed made a blanket downward adjustment of \$7,500.00 for its malfunctioning heating system,³ but he also considered the age and quality of the individual comparables. Mr. Korb made an across-the-board \$15,000.00 downward adjustment in comparing the condition of the Residence with that of all the comparables, regardless of the age of the other homes, which ranged from 1 to 22 years. (Trans. at 1:52:54-1:58:00). Mr. Korb did not explain how he arrived at the specific \$15,000.00 adjustment since he categorized the condition of the Residence as "average" in his report.⁴

Finally, Mr. Huey's appraisal was conducted nearly five months closer to the Petition Date than Mr. Korb's. Courts in the Sixth Circuit hold that the Petition Date is the appropriate date for determining whether a mortgage is secured.⁵ *Farthing*, 2005 Bankr.

³Mrs. Masirovits testified that the heating system did not heat the house above 68 degrees, despite using as much as \$1200.00 worth of propane each month. However, Mr. Huey's comment addendum to his appraisal states that Debtors gave him copies of their propane bills for the period from April 2005 through March 2008, indicating a total propane expense of \$8,652.96, which translates to an average monthly cost of \$247.22. Debtors did not challenge the comment addendum.

⁴Mr. Korb's repeated references in both his testimony and appraisal to a "black untested substance" found on the underside of the floorboards and windowsills indicate to the Court that this was one of his main concerns, although he also testified that he lacks the expertise to identify mold, and that no mold inspection was performed. Mr. Huey indicated that the sill discoloration appeared to be water damage, and that he does not make an adjustment for mold unless the presence of dangerous mold is actually determined by a mold inspection and test. Debtors did not address their reason for not testing the Residence for mold.

⁵Some other courts use either the plan confirmation date or a totality of the circumstances test. *Pees v. DAN Joint Venture II (In re Claar)*, 368 B.R. 670, 675, n.6 (Bankr. S.D. Ohio 2007). "However, Lane instructs that the focus under *Nobelman* is on the 'rights of holders of secured claims,' and that the threshold determination is whether the creditor is a holder of a secured claim at all. 'A claim in bankruptcy arises at the date of the filing of the petition.'" *Farthing*, 2005 Bankr. LEXIS 97 at *6 (internal citations omitted). See also, *In re Baker*, 2008 Bankr. LEXIS 2809 (Bankr. N.D. Ohio 2008) ("The majority of courts . . . have held that the critical date for deciding whether

Lexis 97 at *5. Considering all of the above, Mr. Huey's appraisal is more credible. Therefore, the Court adopts Mr. Huey's appraisal and finds that the fair market value of the Residence as of the Petition Date was \$227,000.00.

B. Priority of Liens

Having determined the fair market value of the Residence, the Court's next task is to determine the order of priority for the Junior Mortgages. Valley argues that its lien on the Residence is higher in priority than Geauga's second mortgage. If Valley is correct, than Geauga's second mortgage would be entirely unsecured.

Valley bases its argument on the State Court Judgment, which refers to the Valley lien as the "second mortgage." According, to Valley, this Court should find the State Court's use of "second mortgage" to be *res judicata* in the instant case. Valley cites two cases in support of its argument: *In re Monas*, 309 B.R. 302 (Bankr. N.D. Ohio 2004), and *Daneman v. Fed. Home Loan Mortg. Corp. (In re Hoff)*, 187 B.R. 190 (Bankr. S.D. Ohio 1995).

Pursuant to the Full Faith and Credit Statute, 28 U.S.C. § 1738, bankruptcy courts must give a prior state court judgment the same preclusive effect as would be given that judgment under the law of the State in which that judgment was rendered. *In re Monas*, 309 B.R. at 306. The party asserting preclusion bears the burden of proof, by a preponderance of the evidence. *Id.*

In Ohio, the doctrine of *res judicata* encompasses the two

a creditor qualifies for protection under [§ 1322(b)(2)] is the date the petition is filed.").

related concepts of claim preclusion, also known as *res judicata* or estoppel by judgment, and issue preclusion, also known as collateral estoppel. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381 (1995). For *res judicata* to apply in Ohio, the prior state judgment must be (i) final; (ii) rendered on the merits; and (iii) based on the same claim or cause of action as the current suit. *In re Hoff*, 187 B.R. at 194. On the other hand, “[u]nder Ohio law, the doctrine of collateral estoppel, otherwise known as issue preclusion, prevents a party from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit that was a final judgement on the merits.” *In re Monas*, 309 B.R. at 306.

Valley’s argument fails because the State Court Judgment is not a final judgment on the issue of lien priorities in this case. Unlike either of the cases cited by Valley, the State Court in the foreclosure action reserved for a later date any final judgment as to the priority of liens against the Residence. Specifically, Paragraph 9 of the State Court Judgment says:

The court further finds that Defendant, Geauga Savings Bank, has filed an Answer herein asserting a note and mortgage. If the allegations of the answer are true, the mortgage of Defendant, Geauga Savings would be superior to those of [Valley]. The final proceeds of sale shall be withheld pending determination of the validity of Geauga Savings note and mortgage. Following the sale, counsel shall submit a further entry establishing priority of liens and judgment reflecting the amount due to the parties from proceeds of sale.

(Stip. Ex. A, ¶ 9) (emphasis added). While it is true that the State Court Judgment only references one of Geauga’s mortgages, it is not clear from the Judgment which of those mortgages is

specified. Furthermore, the State Court Judgment expressly withholds final judgment as to the priority of liens, pending further action by the parties. Such action was forestalled by Debtors' filing their chapter 13 petition.

Valley has failed to carry the burden of proof needed to establish preclusion on the issue of lien priority. Therefore, the parties' joint Stipulation controls, and the priority of the three liens, for the purpose of this Opinion, is as follows: (i) Geauga's first lien; (ii) Geauga's second lien; and (iii) Valley's lien.

C. Validity of Liens

Having determined the fair market value of the Residence and the priority of the liens against it, the Court now turns to the final issue - whether each lien is secured or unsecured, which status will determine whether Debtors may avoid any lien.

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 2008). However, 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.* (emphasis added).

"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." *Lane v. Western*

Interstate Bancorp (In re Lane), 280 F.3d 663, 664 (6th Cir. 2002). 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. *Id.* (citing *Nobelman*, 508 U.S. 324). See also, *In re McClurkin*, 31 F.3d at 406 ("[A]lthough a creditor whose only security is the debtor's home may be undersecured, § 1322(b)(2) protects the creditor's entire claim and lien from modification[.]")

In the instant case, both the Geauga first and second mortgages are fully secured. The Valley mortgage claim is undersecured, which means it, too, is a "secured claim" for the purposes of § 1322 analysis. *Lane*, 280 F.3d at 669. All three claims are "secured only by a security interest in real property that is the debtor's principal residence," and, thus, not subject to modification under § 1322. Therefore, Debtors cannot avoid either of the Junior Mortgages, which remain as liens against the Residence, in the amounts jointly stipulated by the parties.

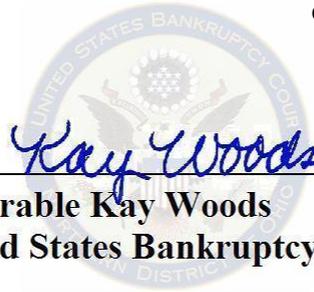
III. Conclusion

The Court finds for the Defendants, Geauga Savings Bank and Valley Building Center. Both the Geauga mortgage liens and the Valley mortgage lien are secured claims. Debtors may not avoid any of these liens on the Residence.

An appropriate Order will follow.

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IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JAMES M. MASIROVITS and
KIMBERLY A. MASIROVITS,

Debtors.

CASE NUMBER 07-43216

JAMES M. MASIROVITS and
KIMBERLY A. MASIROVITS,

Plaintiffs,

ADVERSARY NUMBER 07-04177

vs.

CHAPTER 13

GEAUGA SAVINGS BANK

and

HONORABLE KAY WOODS

VALLEY BUILDING CENTER, INC.

Defendants.

ORDER FINDING DEFENDANTS' LIENS TO BE VALID

For the reasons set forth in this Court's Memorandum
Opinion entered this date, the Court finds that (i) the residential
property of Debtors James M. Masirovits and Kimberly A. Masirovits

had a fair market value of \$227,000.00 as of the Petition Date; (ii) Defendant Geauga Savings Bank holds the first and second mortgages on said property, while Valley Building Center's mortgage is third in priority; (iii) all three mortgages are secured; and, therefore, (iv) Debtors may avoid none of the mortgage liens.

IT IS SO ORDERED.

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