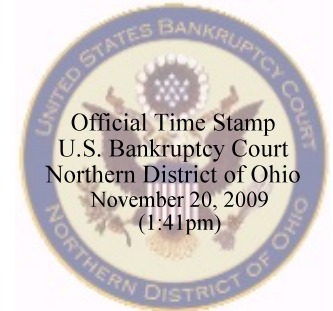


UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 09-10442
)	
CAESAR L. MALCOLM,)	Chapter 13
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
CAESAR L. MALCOLM,)	Adversary Proceeding No. 09-1189
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION AND</u>
)	<u>ORDER DENYING MOTION FOR</u>
)	<u>SUMMARY JUDGMENT</u>
CITY OF CLEVELAND, DEPARTMENT)	
OF COMMUNITY DEVELOPMENT,)	
)	
Defendant.)	

Chapter 13 debtor Caesar Malcolm filed this adversary proceeding seeking to avoid under 11 U.S.C. § 506(d) a second mortgage lien held by the City of Cleveland on the debtor's residence at 9707 Raymond Avenue, Cleveland, Ohio. The debtor moves for summary judgment, arguing that there is no equity in the property to support Cleveland's lien. Cleveland contends that summary judgment should not be entered because there is a genuine issue of material fact as to the property's value.¹ For the reasons stated below, the motion is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (K).

¹ Docket 26, 27, and 28.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. At that point, the burden is on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion “by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves” *Id.* at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing summary judgment. *Hanover Ins. Co. v. Am. Eng’g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment is granted only when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (internal citations and quotation marks omitted).

FACTS AND POSITIONS OF THE PARTIES

The parties agree that Third Federal Savings and Loan Association holds a first mortgage on the property to secure a debt of about \$23,000.00 and that Cleveland holds a second mortgage on the property to secure a debt of about \$38,000.00.²

There is a dispute, however, as to the property’s fair market value. The debtor supported his motion for summary judgment with an appraisal from Tabitha Stephens, a certified real estate appraiser. Ms. Stephens appraised the residence at \$5,500.00. In his motion, the debtor

² Joint Pretrial Statement, Docket 18.

challenges an appraisal provided by Cleveland during discovery that appraises the property at \$42,000.00. The debtor argues that this Restricted Use Appraisal by Carlos Brown should not be considered because: (1) it is intended for limited use; (2) the appraiser is less qualified than the debtor's appraiser; and (3) there is an error in the appraisal. If this position is accepted, the Third Federal Savings and Loan Association lien exceeds the value of the residence based on the debtor's appraisal. Cleveland responds that the relative merits of the appraisers' qualifications and opinions is an issue of material fact that bars entry of summary judgment.

DISCUSSION

_____ The debtor's proposed application of bankruptcy code § 506³ turns on whether, and by how much, the value of his residence exceeds the first lien held by Third Federal Savings and Loan Association. The property's value is, therefore, a material fact that the debtor must prove in his case. When expert testimony is offered on valuation, "a court must necessarily assign weight to the opinion testimony received based on its view of the qualifications and credibility of the parties' expert witnesses." *In re Smith*, 267 B.R. 568, 572 (Bankr. S.D. Ohio 2001). Credibility is determined at trial, after the court has had the opportunity to observe the witnesses and consider their qualifications.

Nevertheless, the debtor argues that Cleveland's expert testimony should be rejected before trial because it is based on a Restricted Use Appraisal. The debtor has not, however, offered any legal support for the proposition that such an appraisal is not admissible evidence. The debtor may challenge the nature of the appraisal at trial and argue that the weight assigned to it should be less than that given to the appraisal offered by the debtor, but it is not appropriate to

³ Cleveland does not dispute the debtor's legal theory and the court will not address that issue at this time.

exclude the appraisal from consideration at the summary judgment stage. The debtor also argues that Cleveland's appraisal should be discounted because Mr. Brown's qualifications are allegedly not as strong as those of the debtor's appraiser. This is, again, an issue that can only be resolved at trial. Finally, the debtor attacks the methodology used by Cleveland's appraiser. Again, this is an issue that cannot be resolved at the summary judgment stage of the proceedings.

Because the plaintiff-debtor has not met his burden of showing that there is no genuine issue of material fact regarding the property's value, the motion for summary judgment is denied.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge
