

ENTERED

OCT 12 2005

IN THE UNITED STATES BANKRUPTCY COURT

K.R.W.

FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at 0 o'clock & 00 min
OCT 12 2005
United States Bankruptcy Court
Columbia, South Carolina (3)

IN RE:

C/A No. 05-08244-JW

Sylvia Tonn Godwin,

Chapter 13

Debtor.

ORDER

This matter comes before the Court upon the Continued Confirmation Hearing of Sylvia Tonn Godwin's ("Debtor") Chapter 13 Plan and Mortgage Lenders Network USA's ("Creditor") Objection to Confirmation. Creditor holds a second mortgage on real property that serves as Debtor's residence. The second mortgage secures payment on a note with a remaining balance of \$13,508.00. In her motion to value and plan, Debtor asserts that the \$55,573.00 first mortgage on her real property exceeds the property's market value. Therefore, Debtor, in reliance on 11 U.S.C. § 1322(b)(2), concludes that she is entitled to strip off Creditor's mortgage because the mortgage is unsecured. Creditor contends otherwise by asserting that the value of Debtor's residence is greater than the first mortgage. Accordingly, Creditor concludes that Debtor is not entitled to strip off the second mortgage because it is partially secured by the existing equity in Debtor's residence. The Court notes that neither Debtor nor Creditor presented an appraiser as a witness in order to offer testimony to explain or support their asserted valuations of Debtor's property.

In support of her position, Debtor submitted a Broker Price Opinion into evidence. The Broker Price Opinion lists the sales price of comparable properties previously sold and the sales price of comparable properties listed on the market at that time. The Broker Price Opinion provides a \$45,000.00 figure as the highest sales price

for Debtor's residence and notes that the location of Debtor's home on a "rural soil road with limited access" is a negative factor that "detracts from the subject." Debtor also testified that she believed the property to be valued at \$49,650.00 based upon her discussion with a real estate broker who gave an opinion on the market value of Debtor's home.

On cross-examination, Debtor testified that her residence was appraised at a value of \$70,000.00 by Creditor when she applied for the second mortgage last year. Furthermore, Debtor acknowledged that the tax assessed value on her residence for this year was roughly \$60,000.00.¹ However, although Creditor disputed the validity of the Broker Price Opinion, it failed to offer into evidence any other appraisal or expert testimony to contradict it. Instead, Creditor noted that the Broker Price Opinion was premised upon a "quick sale" or "distress sale" situation. In its arguments, Creditor did reference an appraisal that it attached to its Objection to Confirmation. Although Debtor acknowledged that an appraisal was done when she applied for the second mortgage, the appraisal attached to Creditor's Objection to Confirmation was not authenticated pursuant to Federal Rule of Evidence Rule 901 and was not offered into evidence by Creditor. Accordingly, the appraisal is not evidence before the Court, and its usefulness is limited to being a part of the averments made in the Objection to Confirmation. See Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

¹ Creditor asked the Court to take judicial notice of this tax assessment for the purpose of establishing the value of Debtor's residence by referring the Court to a website for the county making the tax assessment. Rule 201(b) of the Federal Rules of Evidence requires a judicially noted fact to be either "(1) generally known within the territorial jurisdiction of the court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Since the reliability and accuracy of the information provided by the website was not established by Creditor, the Court is not inclined to take judicial notice of the tax assessment for the purpose of establishing a value for Debtor's home.

In this case, it appears that the Broker Price Opinion is the best evidence before the Court of the value of Debtor's residence. The April 2005 comparables listed therein indicate that the Broker Price Opinion is more recent than the appraisal that was performed when Debtor applied for the loan. The Broker Price Opinion also provides some detailing of factors considered in arriving at the range of values for Debtor's residence, most notably the location of Debtor's home on a dirt road with limited access. Furthermore, the Broker Price Opinion was created by a third party that is not affiliated with either Debtor or Creditor. Finally, the Court also notes that the Broker Price Opinion indicates that the broker who created it actually viewed Debtor's residence.

In light of the Broker Price Opinion, the quoted value that Debtor received during her recent conversation with a real estate broker, and Debtor's own statement of value, Debtor met her burden to prove that the value of her home is less than the balance of the first mortgage encumbering it. See In re Utsey, C/A No. 02-8676, slip op. at 3 (Bankr. D.S.C. Oct. 4, 2002) (requiring evidence or testimony to explain an apparent decrease in value between a current appraisal and an appraisal done a year earlier). Furthermore, the Court concludes that Creditor did not present sufficient competent evidence to rebut the evidence presented by Debtor.

Weighing the evidence before the Court and recognizing that it is Debtor's burden of proof to (1) establish value for purposes of stripping off Creditor's mortgage and (2) meet the requirements of confirmation pursuant to 11 U.S.C. § 1325, In re Jurisin, C/A No. 05-06215-JW, slip op. at 3 (Bankr. D.S.C. Aug. 25, 2005), the Court finds that Debtor's home is worth less than the first mortgage on the property. Accordingly, the second mortgage held by Creditor may be valued at zero. See In re Bohland, C/A No.

03-12422, slip op. at 2 (Bankr. D.S.C. Dec. 11, 2003) (finding that the debtors' home was worth less than the first mortgage on the property and noting that creditor failed to offer any other appraisal or expert testimony to dispute an appraisal that debtors submitted into evidence). Therefore, Creditor's Objection to Confirmation, which includes an objection to Debtor's motion to value, is overruled, and a separate order addressing confirmation of the plan shall be entered by the Court.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
October 12, 2005