IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Nancyann Camacho, K.E.P. Debtor.

C/A No. 05-14804-JW

Chapter 13

ORDER

This matter comes before the Court upon the Confirmation Hearing on the Chapter 13 Plan filed by Nancyann Camacho ("Debtor") and American General Finance'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 $38,288.53. In her motion to value and Chapter 13 plan, Debtor asserts that a $75,007.89 first mortgage on her real property exceeds the property's market value of $70,000.00. Therefore, Debtor, in reliance on 11 U.S.C. § 1322(b)(2), concludes that she is entitled to strip off Creditor's mortgage as a secured claim and treat the indebtedness as unsecured. Creditor contends that the value of Debtor's residence is $118,000.00; and thus, Creditor concludes that Debtor is not entitled to strip off Creditor's $38,288.00 second mortgage because it is partially secured by the existing equity in Debtor's residence.

In support of her position, Debtor submitted into evidence, without objection by Creditor, a Uniform Residential Appraisal Report dated October 14, 2005 that was produced by Shumate Appraisal Services (the "Shumate Appraisal"). The Shumate Appraisal included pictures of damage to Debtor's residence and other structures situated on Debtor's real property, and determines the value of Debtor's real property to be $70,000.00.

Debtor also provided the testimony of Dennis R. Shumate,[1] the appraiser who executed the appraisal of Debtor's residence. By comparing the sales price of three properties that were of similar location,[2] size, age, and condition to Debtor's property, Mr. Shumate concluded that Debtor's residence and land is worth $70,000.00. Mr. Shumate also notes that a large majority of Debtor's 6.35 acres of real property is situated in a flood zone; and thus, the use of a large portion of Debtor's property is limited.

In order to establish that Debtor's property is worth more than the present balance of the first mortgage on Debtor's real property, Creditor provided the testimony of Jeffrey Allen Williams, an employee of Creditor who was familiar with Debtor's loan. Mr. Williams testified that when Debtor applied for financing from Creditor, an appraisal was performed on Debtor's real property. Creditor also offered as evidence an appraisal that was made in November 2002 (the "2002 Appraisal").

Debtor objected to Mr. Williams' reference to the valuation provided by the 2002 Appraisal and the entry of the 2002 Appraisal into evidence because Mr. Williams is not an expert at appraising property. Furthermore, Debtor noted that the unavailability of the appraiser that created the 2002 Appraisal denied her the opportunity to cross-examine the appraiser and the findings contained in the 2002 Appraisal.

In response to Debtor's objection, Creditor asserted that the 2002 Appraisal and the information therein may be admitted into evidence pursuant to Rule 803(6) of the

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[1] The Court notes that Mr. Shumate is certified residential real estate appraiser with approximately 15 years of experience, operates his own appraisal company in Columbia, South Carolina, and has substantial experience in valuing residential properties in the county where Debtor's residence is situated.

[2] The three properties selected by Mr. Shumate were located within six miles of Debtor's property.

Federal Rules of Evidence because the appraisal is a regularly kept business record of Creditor. However, in light of the nature of Debtor's objection, Creditor's reliance on Rule 803(6) for the admissibility of the 2002 Appraisal is misplaced. See Forward Communications Corp. v. United States, 608 F.2d 485, 510 (Ct. Cl. 1979) (noting that nothing in Rule 803 prohibits certain documents from being excluded by some rule other than Rule 802's prohibition of hearsay).

Debtor objects to Mr. Williams' testimony as to the value of Debtor's property and the admission of the 2002 Appraisal on the grounds that Mr. Williams is not qualified to provide a sufficient foundation for the entry of the 2002 Appraisal into evidence because he is not an expert in field of real property appraisal. Moreover, Debtor points out the fact that Creditor did not make the preparer of the 2002 Appraisal available at the hearing. Therefore, Debtor bases her objection on Rule 702 of Federal Rules of Evidence.

Rule 702 of the Federal Rules of Evidence provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness *qualified as an expert by knowledge skill, experience, training, or education*, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 (emphasis added).

In this case, Creditor presented no evidence establishing Mr. Williams as an expert in the field of appraising real property. Furthermore, Creditor presented no evidence identifying the preparer of the appraisal as someone qualified to render an

opinion as the value of the Debtor's real property. Accordingly, in the absence of Creditor's appraiser and any evidentiary foundation establishing the appraiser's qualifications and valuation methodologies, the 2002 Appraisal and Mr. Williams' reference to it for the purposes of valuing Debtor's property are inadmissible[3] expert testimony with respect to the valuation of Debtor's property. See Forward Communications Corp., 608 F.2d at 511 (concluding that appraisal reports were inadmissible expert testimony with respect to valuation of certain property because the preparer of an appraisal did not appear and no foundation with respect to the preparer's identity or qualifications was provided). See also In re Wright, No. 01-2305-W, 2001 WL 1804187 at *1 n.1 (Bank. D.S.C. June 13, 2001) (sustaining debtor's objection to introduction of appraisal into evidence absent testimony of the appraiser herself); In re Roberts, 210 B.R. 325, 329 (Bankr. N.D. Iowa 1997) (excluding appraisals as inadmissible hearsay where preparer of appraisals were not present for cross-examination); Briarbrook Development Corp. v. Clay, 11 B.R. 515, 519 (Bankr. W.D. Mo. 1981) (concluding that witness testimony concerning value of certain bonds was inadmissible hearsay because witness had no personal knowledge of value and witness relied upon valuation provided in appraisal of unavailable experts). See also Russell, BANKRUPTCY EVIDENCE MANUAL § 803.18 (2006 ed.) ("reports which are prepared to state or support expert opinions are not admissible without the preparer being present in court to testify as to his qualifications pursuant to Rule 702 and to be cross-examined on the facts underlying his opinion under Rule 705").

[3] Debtor testified that Creditor initially procured an appraisal that did not value Debtor's property at an amount sufficient to extend a second mortgage to Debtor. However, the 2002 Appraisal was the product of Creditor efforts to find an appraiser that would value Debtor's property at an amount sufficient to provide grounds to extend Debtor additional financing.

Despite the exclusion of the 2002 Appraisal and Mr. Williams' testimony concerning that value of Debtor's property, the Court notes that Debtor acknowledged that Creditor procured an appraisal that valued her real property at $118,000.00. Nevertheless, since Debtor could not identify the appraisal and testified that she never reviewed it, Debtor's testimony does not provide a sufficient evidentiary foundation for the entry of the 2002 Appraisal into evidence. At best, Debtor's testimony simply establishes that her property was once valued at $118,000.00 at the time she applied for financing from Creditor in 2002. Thus, the Court shall consider the $118,000.00 value noted by Debtor against the detailed testimony provided by Debtor's appraiser.

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.

January 10, 2006

UNITED STATES BANKRUPTCY JUDGE