

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at _____ O'clock & _____ min. _____ M
APR 25 2012
United States Bankruptcy Court
Columbia, South Carolina (37)

IN RE:

C/A No. 11-07600-JW

James Preston Martin and Angela Mishele
Martin,

Chapter 13

ORDER

Debtor(s).

This matter comes before the Court upon a confirmation hearing on the Chapter 13 plan ("Plan") filed by Debtors. CPM Federal Credit Union ("CPM") filed an objection to confirmation on the grounds that the plan violates 11 U.S.C. § 1322(b)(2). Pursuant to Federal Rule of Civil Procedure 52, which is made applicable to this matter by Federal Rules of Bankruptcy Procedure 7052 and 9014(c), the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On December 8, 2011, Debtors filed a petition for relief under chapter 13 of the Bankruptcy Code. At the same time, Debtors also filed their Schedules, Statements, and Plan.
2. According to Schedule A, Debtors are the owners of real property located at 662 Sams Point Road in Beaufort, South Carolina, which they use as their principal residence (the "Property"). Debtors asserted in Schedule A that the value of the Property is \$130,000.00.
3. According to Schedule D, the Property is encumbered by a first mortgage held by Wells Fargo Home Mortgage. The parties stipulated that the balance owed on the first mortgage is \$142,256.14 for purposes of the hearing.
4. CPM Federal Credit Union ("CPM"), the holder of a second mortgage on the Property, filed a proof of claim asserting a secured claim in the amount of \$45,867.67.

5. Debtors' Plan includes a motion to establish the value of CPM's lien at \$0.00 pursuant 11 U.S.C. § 506 on the grounds that the value of the first mortgage lien exceeds the value of their residence.

6. CPM objects to confirmation on the grounds that the plan violates 11 U.S.C. § 1322(b)(2) by improperly stripping off its lien, and argues that Debtor's principal residence is worth more than the balance of the first mortgage.

7. At the confirmation hearing on February 9, 2012, each party called an appraiser to testify. The appraisers were both qualified as experts in the field of residential home appraisals and each of them submitted written appraisals of the Property which reflected their opinion of its value. The appraisals were admitted into evidence without objection.

8. Using the sales comparison approach,¹ Debtors' appraiser, Ms. Careyann Clamens, estimated the Property's value to be \$137,000.00 as of January 24, 2012. Applying the same approach, CPM's appraiser, Mr. James Gay Jr., estimated that the Property was worth \$145,000.00 as of February 1, 2012.

9. Ms. Clamens compared the sales prices of four recent homes sales as well as two active listings to determine her estimated value of \$137,000.00. Two of the recent sales were foreclosures and two were arm's length transactions. Additionally, one of the active listings considered by Ms. Clamens was a bank-owned property. On cross examination, Ms. Clamens testified that foreclosure sales and arm's length transactions should both be used to determine a home's fair market value. She also stated that the condition of the Property had a significant negative effect on its value. In her appraisal, she made the following notes regarding the condition of the interior of the home: there is unfinished drywall, missing baseboards, molding,

¹ In the sales comparison approach, the sales prices of homes that recently sold are adjusted to reflect the differences between those homes and the property being appraised. The adjusted sales prices are then averaged to estimate the subject property's market value.

and flooring in the foyer; missing countertops, an unfinished ceiling, and an exposed pipe in the middle of the floor in the kitchen; missing baseboards, several drywall areas needing repair, and old, stained carpet in the living room; unfinished drywall, missing baseboards, and exposed wiring in the laundry room, and unfinished drywall in the formal dining room.

10. Mr. Gay compared the sales price of three recent home sales, none of which were foreclosures, to estimate the Property's value at \$145,000.00.² His appraisal noted that "the subject property is in a state of disrepair as it undergoes a renovation. Various issues with flooring, drywall, electrical, interior trim are affected reducing the marketable condition of the structure in its present condition." Mr. Gay estimated that in order to bring the Property into a marketable condition, the necessary repairs to the interior and exterior would cost roughly \$5,000.00. Mr. Gay opined that foreclosure sales should not be used to determine a home's fair market value.

11. Debtor James Martin also testified regarding the value of the Property at the hearing. He stated that he valued the Property at \$130,000.00 based on the current state of the housing market and the condition of the Property. Mr. Martin is a carpenter and was in the process of renovating the Property himself, but was unable to complete the renovations due to financial difficulties resulting from the decline of the construction industry during the economic downturn. Regarding the Property's exterior, Mr. Martin testified that the vinyl siding has rotted and needs replacing, that the roof is missing shingles, and that the pool needs to be serviced and repaired. Regarding the interior, Mr. Martin stated that the Property needs, among other things, drywall, paint, and trim in a number of rooms, as well as new flooring and carpeting in some of the living areas. Additionally, Mr. Martin stated that the kitchen is missing some cabinets and

² While Mr. Gay also included an active listing and a pending sale in his appraisal report, it does not appear that he included the adjusted values of these comparables to arrive at his appraised value.

countertops and that there are exposed electrical wires throughout the Property, which need to be repaired in order to ensure compliance with local building codes. Finally, Mr. Martin stated that the fireplace was also not up to code and was missing a mantle. The pictures attached to both experts' appraisals corroborated Mr. Martin's testimony regarding the Property's condition. According to Mr. Martin, it would cost between \$15,000.00 and \$20,000.00 in labor costs alone to make the required repairs.

CONCLUSIONS OF LAW

Debtors assert that they can strip off CPM's lien pursuant to 11 U.S.C. § 506 because their evidence and testimony shows that the value of their Property is less than the balance due on the first mortgage of \$142,256.14. Debtors bear the burden of establishing value for purposes of stripping off CPM's mortgage and meeting the requirements of confirmation pursuant to § 1325. In re Godwin, C/A No. 05-08244-JW, slip op. at 3 (Bankr. D.S.C. Oct. 12, 2005). The appraisal presented by Debtor uses two foreclosure sales and one active listing as comparable sales for determining the estimated value of the Property. This Court has recently held that foreclosure sales are not the most reliable indications of value for determining a home's fair market value using the sales comparison approach when a debtor attempts to avoid a second lien on a principal residence that the debtor intends to keep. In re Strever, C/A No. 11-06474-JW, slip op. at 8 (Bankr. D.S.C. Mar. 7, 2012) ("[T]he Court finds that a similar home sold in an arm's length transaction between two individual owners, adjusted for the material differences from the property being appraised, is the most accurate way to determine a property's market value for the purposes of § 506(a)(1) and § 1322(b)(2)."). The Court has similarly found that active listing prices are also not the most reliable way to determine fair market value. Id. at 9. Inasmuch as the appraisal submitted by Debtors is significantly based upon a comparison with

sales of distressed properties, the Court declines to find it entirely persuasive. Nevertheless, the Court does find that the \$10,000.00 negative adjustment of value Ms. Clamens applied to account for the repairs needed to the property is supported by Mr. Martin's testimony and the photographs introduced into evidence.

Between the two appraisals, the comparable sales presented by Mr. Gay in his appraisal are more convincing for use in determining market value of the Property since they are arm's length transactions. However, Mr. Gay only made a \$5,000.00 negative adjustment to his comparable sales to reflect the Property's unfinished condition. Based on the testimony of Mr. Martin, as well as the pictures and commentary attached to the appraisals, the Court finds that the total repair costs will likely exceed \$5,000.00 and concludes that Ms. Clamens' negative adjustment of \$10,000.00 is more reasonable. If Mr. Gay had assessed the cost of the necessary repairs at \$10,000.00, the adjusted sales prices of Comparable Sales Nos. 1, 2, and 3 in his appraisal would be \$149,900.00, \$147,000.00, and \$124,800.00. If these adjustments are made and the revised comparables are averaged, the estimated market value of the Property using the sales comparison approach would be \$140,566.66. If Ms. Clamens' two arm's length transactions, which have adjusted sales prices of \$137,500.00 and \$140,200.00, are also averaged with the comparable sales used by Mr. Gay, the estimated market value of the Property would be \$139,880.00. Under the circumstances, the Court finds that this estimate more accurately reflects the Property's market value. See Beneficial Consumer Discount Co. v. Erb (In re Erb), No. 1:10-bk-08958MDF, 2011 WL 2600647, at *3 - 4 (Bankr. M.D.Pa. Jun. 29, 2011) (finding the appraisal testimony of each party's expert to be flawed and determining value by averaging all comparable properties offered by the appraisers and applying negative adjustment used by debtors' appraiser).

Weighing the evidence presented, the Court finds that the market value of the Property is less than the stipulated amount of the first mortgage on the Property. Accordingly, CPM's second mortgage may be valued at zero. It is therefore

ORDERED that CPM's Objection to Confirmation is overruled. The Chapter 13 Trustee shall make a recommendation regarding confirmation of Debtors' Plan within ten days of the entry of this Order.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
April 25, 2012