Not intended for publication

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

Thomas Hodge and
Beth Hodge, **Case No. 00-12910**

Debtors. **Chapter 13**

Thomas Hodge and
Beth Hodge,

Plaintiff,

v. **Adv. Pro. No. 00-5268**

Advanta Finance Co.,

Defendant.

MEMORANDUM OPINION AND ORDER RE
COMPLAINT TO DETERMINE EXTENT AND VALIDITY OF LIEN

The Court conducted a trial in this matter on August 23, 2001. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

At the hearing on the instant complaint, the parties submitted the matter to the Court on the following stipulations.

Debtors filed Chapter 13 on August 14, 2000. They listed Advanta Mortgage [("Advanta")] as first mortgage [holder] with a debt of $71, 194.57. Advanta also held a second mortgage on Debtor's residence for $33,982.50 which was listed as unsecured [with] no equity after first mortgage.

Debtors stated that their residence at 1023 Lightfoot Road, Ripley only had a value of $47,000.00 per their tax statement.

Debtors filed a Complaint to Determine extent and validity of lien with the Court on August 14, 2000, which was heard by the Court on October 12, 2000. Debtors' counsel orally moved for default and motion was granted as there was no response from said creditor. The order was entered and signed by this Court on October 30, 2000.

On November 10, 2000, Advanta Mortgage filed their two claims with the Chapter 13 Trustee for $71, 194.57 on one mortgage and $35,539.56 for second mortgage. (The documents show that both mortgages were dated November 4, 1999, for a total loan on the same day of $106,734.13.) Neither document states first or second mortgage. The appraisal dated October 19, 1999 for that loan showed a value of $84,000.00. This means the creditor knew they were undersecured by $22,734.13 at the time the loan was made.

The Deed of Trust for $71,317.32 was recorded November 8, 1999, Book 423, Page 34, at 9:14 a.m. in Lauderdale County Register's office. The Deed of Trust for $33,000.00 was recorded the same day Book 423, Page 40, at 9:20 a.m.

Advanta filed a motion to reopen the adversary to set aside the order granting complaint to determine extent and validity of lien as they stated they did not receive notice until after the complaint was heard. Motion was granted on January 25, 2001, and this is the hearing on the resetting of the motion.

Advanta stands on its original appraisal dated October 19, 1999 with a value of $84,000.00.

Debtors employed Floyd Akin, a Real Estate Broker who prepared a new appraisal dated June 12, 2001, which shows a value of $68,000.00.

The First mortgage balance is $71,194.57. If the property is worth $68,000.00, there is no equity after the first mortgage for the second to capture and the second mortgage of $35,539.56 is undersecured and should be treated as general unsecured.

II. CONCLUSIONS OF LAW

The debtors in this case wish to determine the extent and validity of the two liens on their property. Section 506 of the Bankruptcy Code states that:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . .is a secured claim to the extent of the value of such creditors' interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.
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> . . . . .
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> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless –
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> (1) such claim was disallowed only under section 502(b)(5) or 502 (e) of this title; or
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> (2) such claim is not an allowed secured claim due only to the failures of an entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506. In the case of *Smith v. First Citizens Bank*, 215 B.R. 716 (Bankr. W.D.Tenn. 1998), this Court had the opportunity to address the issue of whether a debtor may strip down liens under § 506. In so doing, the Court adopted Judge Stinnett's analysis of the law as set forth in *In re Bivvens*, 216 B.R. 622 (Bankr. E.D.Tenn. 1997) as its own.

In Bivvins, Judge Stinnett was faced with deciding whether an undersecured creditor's claim could be modified by the debtor's plan under § 1322. In making his decision, Judge Stinnett set out a lengthy and thorough analysis of what constitutes an allowed secured claim and at what point such a claim can be modified:

> A claim is undersecured when the value of the collateral is enough to pay only part of the debt it secures. The creditor has an *allowed secured claim* only for the value of the collateral that is available to pay its debt. 11 U.S.C. § 506(a). Section 1325(a)(5) allows cram-down of an undersecured claim. In a cram-down, the debtor can obtain the collateral free of the creditor's lien by paying the present value of the allowed secured claim, not the full amount of the claim. 11 U.S.C. § 1325(a)(5)(B).
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> The home mortgage exception in § 1322(b)(2) appears to prevent cram-down of an undersecured home mortgage claim, but some courts reached the conclusion that cram-down, or a modified version of cram-down, was allowed. *See, e.g., In re Bellamy,* 962 F.2d 176 (2nd Cir. 1992); *In re Hart,* 923 F.2d 1410 (10th Cir. 1991); *Wilson v.*

Commonwealth Mortgage Corp., 895 F.2d 123 (3d Cir. 1990); *In re Hougland*, 886 F.2d 1182 (9th Cir. 1989). The Supreme Court rejected their reasoning and reached the opposite conclusion in *Nobelman v. American Savings Bank,* ___ U.S. ___, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993).

The Supreme Court agreed with the chapter 13 debtors' argument that "secured claims" in § 1322(b)(2) means "allowed secured claims" under § 506(a). The court explained that the creditor in *Nobelman* had an allowed secured claim since the collateral had value enough to secure $23,500 of the debt. *Nobelman*, 113 S.Ct. at 2110.

Next, the Supreme Court adopted the obvious interpretation of "rights." It held that "rights" means the secured creditor's rights as they would be outside of bankruptcy. *Nobelman*, 113 S.Ct. at 2110. The debtors contended the exception applied only to the creditor's rights in bankruptcy as the holder of an allowed secured claim. They based this argument on interpreting "a claim secured only by" a home mortgage to mean "an allowed secured claim secured only by a home mortgage."

The Supreme Court rejected the debtor's argument, but the course of its reasoning obscures its holding. The court held that "a claim secured only by" should be interpreted to mean both components of the undersecured creditor's claim — the allowed secured claim for $23,500 and the unsecured claim for the remainder of the debt. The court pointed out that § 506(a) used essentially the same wording to refer to both parts of an undersecured claim. Thus, the exception was not restricted to the creditor's rights in the chapter 13 case as the holder of an allowed secured claim. *Nobelman*, 113 S.Ct. at 2111.[1]

This reasoning was not entirely necessary for the court to reach the same overall result. Even if "claim secured only by" means "allowed secured claim secured only by," the result would be the same. This is true under the Supreme Court's earlier interpretation of "rights" to mean the rights the creditor would have outside of bankruptcy, not just its rights in the bankruptcy case as the holder of an allowed claim. Since the word "rights" appears only once in § 1322(b)(2), it must mean the same thing with regard to every type of claim dealt with by § 1322(b)(2), including an allowed secured claim secured only by a home mortgage. Thus, the rights protected by the home mortgage exception must be the same rights that can be modified. If "a claim secured only by" meant "an allowed secured claim secured only by," the exception would protect the same rights. Thus, the Supreme Court could have said that so long as the creditor has an "allowed secured claim secured only by" a home mortgage, then the exception protects the creditor's rights under its entire claim.

The Supreme Court's failure to say this gives rise to Greentree's argument, though it requires a slightly different view of the Supreme Court's reasoning. According to this view, the Supreme Court did not expressly *require* the creditor to have an allowed secured claim in order to invoke the exception. Furthermore, the Supreme Court dwelled on the broad meaning of "a claim secured only by" as including the creditor's allowed secured claim and its unsecured claim. It follows, according to Greentree's argument, that the exception applies if the creditor does not have an allowed secured claim; it

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[1] The debtors' interpretation of the statute was nonsensical for another reason. If "rights" means only the creditor's right in bankruptcy as holder of an allowed secured claim, then any confirmable plan will not modify those rights. 11 U.S.C. § 1325(a)(1) & (5). There is no need for a statute, such as § 1322(b)(2), that authorizes the plan to modify the creditor's rights and no need for an exception for home mortgages.

applies to the creditor's claim that is unsecured only because the value of the property is not sufficient to make the claim an allowed secured claim under § 506(a).

To agree with Greentree's argument, the court must interpret the home mortgage exception as broader than the rule to which it is an exception. According to the Supreme Court, the general rule provides that a plan can modify the rights of holders of *allowed* secured claims. Greentree contends the exception applies to the rights of a claimholder who has only an unsecured claim "secured only by" a home mortgage. This is the same thing as saying that § 1322(b)(2) silently repeats the home mortgage exception in the subsequent portion of the statute that allows a plan to modify the rights of holders of *unsecured* claims.

Judge Lundin takes this view in his treatise on chapter 13. He reasons that the Supreme Court's decision on the meaning of "a claim secured only by" a home mortgage serves no purpose unless it was intended to make the exception apply without regard to whether the home mortgage gives the creditor an allowed secured claim. 1 Keith A. Lundin, *Chapter 13 Bankruptcy* § 4.46 at 4-56 (1994).

Why did the Supreme Court decide whether "a claim secured only by" refers to the creditor's allowed secured claim or its entire claim? Earlier in the opinion the Supreme Court's held that the "rights" protected by the exception are the rights the creditor would have outside bankruptcy, not just its rights in the chapter 13 case as holder of an allowed secured claim. The debtors argued, in effect, that "a claim secured only by" put a restriction on this definition. It protected only the creditor's rights in bankruptcy as holder of an allowed secured claim. The Supreme Court disagreed. It held that "a claim secured only by" refers to the entire claim; it does not restrict the protected rights to the rights the creditor has in the chapter 13 case as holder of an allowed secured claim. The Supreme Court's reasoning disposed of the debtor's argument that "a claim secured by" put a restriction on the court's interpretation of "rights." This reasoning was not absolutely necessary to reach the same overall result, but it served a purpose nevertheless. In this regard, the court observes that courts do not always take the shortest logical route to a decision. Rejecting all the wrong arguments on the simplest grounds can be the most efficient and conservative way of deciding a case.

If the Supreme Court intended to make the exception apply to creditors without allowed secured claims, it certainly could have made the point clearly. The steps in Greentree's argument reveal that the opinion is not clear at all on this point. Furthermore, during the crucial part of the opinion the Supreme Court left no doubt it was dealing with an undersecured claim and a creditor with an allowed secured claim. *Nobelman*, 113 S.Ct. at 2111.

Greentree is not the holder of an allowed secured claim. Therefore, the portion of § 1322(b)(2) that allows a plan to modify the rights of holders of allowed secured claims is irrelevant to how the plan can deal with Greentree's claim. Likewise, the home mortgage exception is irrelevant since it is contained within that portion of § 1322(b)(2). The plan can modify Greentree's rights as the holder of an unsecured claim.

The great majority of reported decisions have reached the same conclusion. *In re Geyer*, 203 B.R. 726 (Bankr. S.D. Cal. 1996); *In re Sanders*, 202 B.R. 986 (Bankr. D. Neb. 1996); *In re Libby*, 200 B.R. 562 (Bankr. D. N.J. 1996); *In re Purdue*, 187 B.R. 188 (S.D Ohio 1995); *In re Lee*, 177 B.R. 715 (Bankr. N.D. ala. 1995); *Norwest Financial Georgia, Inc. v. Thomas (In re Thomas)*, 177 B.R. 750 (Bankr. S.D. Ga. 1995); *In re Mitchell*, 177 B.R. 900 (Bankr. E.D. Mo. 1994); *Castellanos v. PNC Bank (In re Castellanos)*, 178 B.R. 393 (Bankr. M.D. Pa. 1994); *In re Woodhouse*, 172 B.R. 1 (Bankr. D.R.I. 1994); *In re Sette*, 164 B.R. 453 (Bankr. E.D.N.Y. 1994); *In re Moncrief*,

> 163 B.R. 492 (Bankr. E.D.Ky. 1993); *In re Lee*, 161 B.R. 271 (Bankr. W.D. Okla. 1993); *In re Williams*, 161 B.R. 27 (Bankr. E.D. Ky. 1993); *In re Kidd*, 161 B.R. 769 (Bankr. E.D.N.C. 1993); *In re Hornes*, 160 B.R. 709 (Bankr. D. Conn. 1993); *In re Plouffe*, 157 B.R. 198 (Bankr. D. Conn. 1993). A few have agreed with Greentree's argument. *In re Jones*, 201 B.R. 371 (Bankr. D.N.J. 1996); *In re Barnes*, 199 B.R. 256 (Bankr. W.D.N.Y. 1996); *In re Neverla*, 194 B.R. 547 (Bankr. W.D.N.Y. 1996).
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> The court realizes that its interpretation of the statute creates a cut-off point that depends on the valuation of the debtor's home. If the creditor's claim is barely an allowed secured claim under § 506(a), then the exception protects the creditor's rights from modification. For example, the creditor's allowed secured claim may be $500 out of a $10,000 claim; the exception will apply. On the other hand, if the higher priority liens barely exceed the value of the property, then the creditor's rights will not be protected by the home mortgage exception and can be modified. For example, the higher priority liens may secured debts totaling $50,000 on property valued at $49,500. The creditor's lower priority mortgage will not give it any allowed secured claim, and as a result, its entire claim will not be protected by the home mortgage exception. The law sometimes uses cut-off points such as this even if they appear to be unfair. *See, e.g.,* 11 U.S.C. §§ 109(e), 507(a)(3)-(6), 522(d), 523(a)(2)(C) & 547(c)(8). The structure of § 1322(b)(2), however, does not support the conclusion that the exception applies when the claimholder does not have an allowed secured claim.

Id. at 623-25.

According to the *Bivvins* reasoning, if the first mortgage on a piece of property is equal to or larger than the fair market value of that property, then any other mortgage on the property is entirely unsecured and may be avoided. *Id.* A mortgagee who is entirely unsecured is not entitled to be treated as a secured creditor in a Chapter 13 debtor's plan. *Id.* If a mortgage is partially secured and partially unsecured, i.e., the value of the property is less than the total amount of the mortgage, the debtor is not allowed to modify the rights of that mortgagee under 11 U.S.C. § 1322. *Id.* For purposes of determining the fair market value of a piece of property, it is the value of the property at the time the bankruptcy petition is filed and not the time the loan is incurred. *In re McCarron*, 242 BR. 479, 482 (Bankr. W.D. Mo. 2000); *U.S. v. Zolgar*, 126 B.R. 53, 57 (N.D. Ill. 1991).

In the case at bar, Advanta holds a first mortgage on the debtor's residence in the amount of $71,194.57. Advanta holds a second mortgage on the same property in the amount of $33,982.50. Because Advanta's appraisal of $84,000 was done prior to the Hodge's Chapter 13 filing, it is not the proper fair market value. Instead, the Court must look to the June 12, 2001, appraisal of $68,000.00 which was done postpetition. Because the value of the property is $68,000.00 and Advanta's first

mortgage is $71,194.57, the second mortgage is completely unsecured and may be avoided by the debtors.

III. ORDER

It is therefore **ORDERED** that lien encumbering the debtors' property in the amount of $33,982.50 is **AVOIDED**.

It is **FURTHER ORDERED** that Advanta's second mortgage in the amount of $33,982.50 is to be paid as an **UNSECURED CLAIM.**

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: September 27, 2001