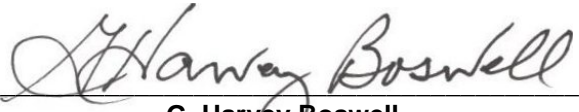


This opinion is not intended for publication.



Dated: August 22, 2007
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

William Earl Cox,

Case No. 06-13200

Debtor.

Chapter 13

William Earl Cox,

Plaintiff,

v.

Adv. Pro. No. 07-5029

MTGLQ Investors, L.P.

c/o Law Office of Shapiro & Kirsch,

Defendant.

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

The Court conducted a trial in this matter on July 26, 2007. 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

The debtor in this case, William Cox, (“Cox” or “debtor”), filed his chapter 13 petition on December 6, 2006. He listed Ocwen Loan Servicing, LLC, (“Ocwen”), on Schedule D of his petition as having a “first mortgage” on his residence with a claim amount of \$41,855.00. Cox listed the value of the property as \$36,800.00. Cox also listed Ocwen on his schedule of unsecured nonpriority creditors with a claim of \$10,365.00 for “second mortgage.” The first page of the debtor’s petition lists his residence as 1431 North 19th Avenue, Humboldt, Tennessee (“Humboldt Property”).

On December 13, 2006, MTGLQ Investors, L.P., (“MTGLQ”), filed a proof of claim in the amount of \$49,002.61 (claim # 1). The proof of claim reflects that Ocwen is the servicing agent for MTGLQ. Claim # 1 states that MTGLQ’s debt is secured by the real estate at 1431 North 19th Avenue in Humboldt and that the property’s value is \$28,250.00. The claim also lists the prepetition arrearage on the debt as \$7,485.95.

On the same day it filed its first proof of claim, MTGLQ filed a second proof of claim in the amount of \$11,633.03 (claim # 2). This proof of claim also reflects that Ocwen is the servicing agent for MTGLQ and that the claim is secured by the debtor’s Humboldt residence. Although secured by the same collateral as claim # 1, MTGLQ listed the value of the collateral for claim # 2 as \$27,500.00. MTGLQ listed the pre-petition arrearage on claim # 2 as \$1,677.79.

Cox filed a “Complaint to Determine the Validity, Priority or Extent of Lien” against MTGLQ on February 2, 2007. In his complaint, Cox stated MTGLQ’s first claim is for its first mortgage on his residence and MTGLQ’s second claim is for its second mortgage. The debtor’s complaint alleged that there is no equity in the Humboldt property to support the second mortgage lien and, as such, MTGLQ’s second claim should be included in his plan as a general unsecured claim.

The parties submitted six exhibits at the trial in this matter. Exhibit 1 is a copy of the sales agreement for the Humboldt property dated January 13, 2005. According to this agreement, the debtor agreed to purchase the Humboldt property from Ann Buchanan for \$49,000.00. Paragraph “6” of the sales agreement states that the seller will pay “up to \$3,500.00 in closing costs and prepaids.” The second sentence of paragraph 7 of the agreement states “Property to appraise for purchase price or greater.”

Exhibit 2 was submitted as a collective exhibit and contains (1) copies of the City of Humboldt certified property tax receipts for 2004 and 2005; (2) a copy of the Gibson County real estate appraisal card for 2004; and (3) a copy of the Gibson County Assessment Roll for 2005. The certified tax receipts for the city of Humboldt value the Humboldt property at \$34,200.00 in both 2004 and 2005. The 2004 State of Tennessee Real Estate Appraisal card appraises the property for \$34,200.00. This card also

reflects that the deed for the property was transferred on April 20, 2005, for a price of \$52,500.00. The Gibson County Assessor made a notation on the side of this appraisal card on July 12, 2007, which stated that “the value of the property did not change in 2005, therefore a new appraisal card was not created in 2005.” The 2005 Gibson County Assessment Roll shows the value of the property to be \$34,200.00.

The third exhibit introduced at the trial was a copy of the Warranty Deed for the Humboldt property which was executed on April 20, 2005. According to the notations at the top of the document, the debtor affirmed at the time of signing the deed that the “actual consideration for this transfer or the value of the property transferred (whichever is greater) is \$52,500.00.”

Exhibit 4 was also submitted as a collective exhibit and contains copies of two U.S. Department of Housing and Urban Development Settlement Statements for the Humboldt property (“settlement statement”). The first settlement statement is dated April 20, 2005, 10:00 a.m. and reflects a contract sales price of \$52,500.00. Lines 200 through 205 of the settlement statement show the “Principal amount of new loan(s) \$42,000.00” and “2nd mortgage proceeds applied to 1st mtg closing costs \$10,500.00.” The second settlement statement is dated April 20, 2005, 9:59 a.m. and shows the “2nd mortgage proceeds applied to 1st mtg closing costs \$10,500.00.”

The last two exhibits entered at the trial are copies of the first mortgage deed of trust for \$42,000.00 and the second mortgage deed of trust for \$10,500.00.

II. CONCLUSIONS OF LAW

In the complaint at issue, the debtor has alleged that there is no equity in the Humboldt residence to support treating MTGLQ’s second mortgage as a secured debt in his plan and, as such, he is entitled to avoid the lien under 11 U.S.C. § 506. Section 506 of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act, (hereinafter “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.

.

(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 –

- (1) such claim was disallowed only under section 502(b)(5) or 502 (e) of this title; or
- (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 previously held that 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. A mortgagee who is entirely unsecured is not entitled to be treated as a secured creditor in a Chapter 13 debtor's plan. 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. 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 deciding whether or not the debtor may avoid MTGLQ's second mortgage on his residence, the Court must first determine the fair market value of the Humboldt property as of December 6, 2006. If MTGLQ's first mortgage exceeds the value of the property, then the debtor may avoid the second mortgage. If, however, the value of the property is greater than the amount of the first mortgage, the debtor may not avoid MTGLQ's second mortgage and must treat them as a secured creditor in his plan.

Neither of the parties to this action introduced any proof regarding the value of the property at the time the petition was filed. The debtor stated on schedule D of his petition that the Humboldt property had a value of \$36,800.00. At the trial, the debtor argued that the correct fair market value of the property was the \$34,200.00 tax appraisal value from the City of Humboldt and Gibson County for 2004 and 2005.

For its part, MTGLQ offered three different values for the property. According to its first claim, MTGLQ listed the value of the property as \$28,250.00. On its second proof of claim, MTGLQ listed the value of the property as \$27,500.00. In its answer to the complaint as well as at the trial, MTGLQ argued that the true value of the property was \$52,500.00 based on the debtor's affirmation at the top of the Warranty Deed which stated that the "actual consideration for this transfer or the value of the property transferred (*whichever is greater*) is \$52,500.00."

The only piece of evidence presented to the Court regarding the sales price for the Humboldt property is the Sales Agreement dated January 13, 2005. This agreement stated that the sales price is \$49,000.00. Although there are several notations on other documents which indicate the sales price was increased to \$52,500.00, there is nothing in the record which proves that the purchase price was ever increased with the debtor's knowledge.

The defendant wholly failed to introduce evidence which demonstrates the value of the property. MTGLQ filed two proofs of claim on the same day. Claim 1 was filed at 10:31 a.m. on December 13,

2006, and reflected a value for the Humboldt property of \$28,250.00. Claim 2 was filed one minute later and reflected a value of \$27,500.00. As far as the debtor's affirmation on the Warranty Deed, the only thing that signature proves is that either the consideration for the transfer of the property was \$52,500.00 or that the value of the property was \$52,500.00. Based on this signature alone, there is no proof that the \$52,500.00 represents the value of the property.

Based on the scant evidence in this case, the Court finds that the highest possible value the proof introduced at the trial shows is the \$49,000.00 purchase price. While it is possible that the actual value of the property is more in line with the \$34,200.00 tax appraisal value, there is nothing in the record which shows that the \$49,000.00 is not an accurate reflection of the property's value. Because MTGLQ's first mortgage claim is for \$49,002.61, Court finds that the value of the property is less than the amount of the first mortgage and, therefore, there is insufficient equity to support the second mortgage.

III. ORDER

It is therefore **ORDERED** that lien in favor of MTGLQ encumbering the debtors' property located at 1431 N. 19th Avenue in Humboldt, Tennessee, in the amount of \$11,633.03 is **AVOIDED**. **IT IS SO ORDERED.**

Mailing information:

Ryan M. Spitzer, attorney for debtor
Sharon Fewell, attorney for Law Office of Shapiro & Kirsch
Tim Ivy, Chapter 13 Trustee