

This opinion is not intended for publication.



**Dated: December 13, 2007**  
**The following is SO ORDERED.**

  
**G. Harvey Boswell**  
**UNITED STATES BANKRUPTCY JUDGE**

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**UNITED STATES BANKRUPTCY COURT**  
**WESTERN DISTRICT OF TENNESSEE**  
**EASTERN DIVISION**

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**In re:**

**JEFFERY A. D. GENESY,**

**Debtor.**

**JEFFERY A.D. GENESY,**

**plaintiff**

**v.**

**WASHINGTON MUTUAL HOME MORTGAGE,**

**defendants.**

**CASE NO. 05-13212**

**Chapter 13**

**Adv. Pro. No. 05-5238**

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**MEMORANDUM OPINION AND ORDER RE:**  
**DEBTOR'S COMPLAINT TO DETERMINE EXTENT AND VALIDITY OF LIEN**

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The Court heard proof and argument in this matter on September 27, 2007, and November 1, 2007. The Court took this adversary proceeding under advisement after the November 1, 2007, trial. 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 parties in this matter do not dispute the facts of this case. The debtor, Jeffery A.D. Genesy (“Genesy”), has asked this Court to determine the extent and validity of Washington Mutual’s lien on his residence located at 150 Smithville Rd., Ripley, Tennessee, (“Ripley property”). Washington Mutual has a first mortgage on the property in the amount of \$45,205.22 and a second mortgage in the amount of \$11,041.03.

The debtor filed his chapter 13 petition on July 20, 2005. According to Schedule A of his petition, Genesy valued the Ripley property at \$46,000.00. Washington Mutual did not object to this valuation. Washington Mutual filed a claim on August 8, 2005, for the first mortgage in the amount of \$46,750.28. Washington Mutual also included the alleged arrearage amount of \$2121.98 on this claim. Washington Mutual filed a second claim on August 12, 2005, in the amount of \$11,323.04. This second claim showed an arrearage amount of \$559.63. Both claims were filed as secured claims. According to the Deeds of Trust filed along with the proofs of claim, the debtor borrowed \$45,520.00 and \$11,380.00 from Washington Mutual on May 27, 2004. Genesy granted Washington Mutual a first and second mortgage on the Ripley property as collateral for these loans. There was no testimony or proof introduced at the trial in this matter about how much Genesy paid for the property.

According to the debtor’s proposed chapter 13 plan, Washington Mutual was to be paid its ongoing and arrearage claims as a “home mortgage” creditor on both the first and second mortgage. An arrearage on the first mortgage for \$2004.00 was included in the plan and the arrearage on the second mortgage was included for \$652.56.

Genesy filed the instant adversary proceeding on September 12, 2005. The Court originally entered an order avoiding the second lien on the house on November 25, 2005. As a result, the debtor’s plan was confirmed on December 9, 2005, with the first mortgage being paid to Washington Mutual as a home mortgage claim and the second mortgage being paid as an unsecured claim.

On February 12, 2007, Washington Mutual filed a motion to reopen the adversary based on an alleged defect with service. The Court granted Washington Mutual’s motion on April 30, 2007. Washington Mutual then filed a Motion to Obtain Relief from the November 25, 2005, judgment. The Court granted that motion on August 13, 2007. Following entry of that order, the complaint was reset for a pretrial conference on August 18, 2007.

The pretrial conference in this matter was continued from August 18, 2007, to September 6, 2007, and then to September 27, 2007. At the September 27, 2007, hearing Washington Mutual introduced into evidence a property evaluation done on the Ripley property by Floyd Akin. The evaluation was done on

April 12, 2007, and was done on a drive-by basis only. Akin valued the property at \$55,000.00 for a quick, 30-day-sale, and \$57,500.00 for a 90 - 120 day sales period. Akin has been a real estate broker in the Ripley area for twenty years. He is not an appraiser, but is often called upon to do property evaluations. Akin based his valuation on his drive-by of the property and comparable house prices in the same area. When questioned about the property's value in 2005, Akin stated that the market was just as good in 2005 as it was on April 12, 2007. He also stated that he did not feel like the house's 2005 value would be much different from the April 2007 evaluation.

At the November 1, 2007, hearing, the debtor submitted the Tennessee tax assessment for the Ripley property for the tax year 2005. According to this assessment, the debtor's house was worth \$46,000.00. The debtor did not testify as to the value or condition of the house. The tax assessment lists 2001 as the reappraisal year for the property.

Based upon the 2005 tax assessment, Genesy alleges that the value of his home is less than the amount due on the first mortgage. As a result, Genesy alleges that Washington Mutual's second mortgage is entirely unsecured, and, as such, that lien should be avoided. Washington Mutual alleges that the tax assessment value is low and the Court should use the April 12, 2007, evaluation to find that there is sufficient value to support the second mortgage.

## **II. CONCLUSIONS OF LAW**

The debtor in this case has asked the Court to determine the extent of the two liens on his primary residence. Genesy has alleged that the value of his property is less than the amount of the first mortgage and therefore, there is not any value to support the second mortgage as a secured debt. As a result, Genesy asserts that he may modify Washington Mutual's second mortgage lien and pay them as an unsecured creditor in his plan.

Section 1322(b)(2) of the Bankruptcy Code prohibits a debtor from modifying, or "stripping down," the rights of holders of claims secured only by the debtor's principle residence. The issue of whether a creditor holds a secured claim, and to what extent, is determined by looking to 11 U.S.C. § 506 of the Code. That section provides:

(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. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property . . .

. . . . .

(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 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 Bivvins*, 216 B.R. 622 (Bankr. E.D.Tenn. 1997) as its own. 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. *Nobelman v. American Savings Bank*, 508 U.S. 324, 331, 113 S.Ct. 2106, 2111, 124 L.Ed.2d 228 (1993); *Bivvins*, 216 B.R. at 625. The Sixth Circuit reached the same result in the case of *Lane v. Western Interstate Bancorp (In re Lane)*, 280 F.3d 663 (6<sup>th</sup> Cir. 2002) (holding that a chapter 13 debtor may, under § 1322(b)(2) modify the rights of creditors who hold a second mortgage on a residence that is valued at less than the amount owed on the first mortgage.)

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 determining the value of collateral under 11 U.S.C. § 506(a), a court must base its decision on the “purpose of the valuation and of the proposed disposition or use of such property.” 11 U.S.C. § 506(a). It is the debtor who bears the burden of proof in establishing value under 11 U.S.C. § 506(a). *In re Finnegan*, 358 B.R. 644, 649 (Bankr. M.D. Pa. 2006). Valuation is a question of fact which must be determined by looking at the evidence presented to the Court. *Matter of Vitreous Steel Products Co.*, 911 F.2d 1223, 1232 (7<sup>th</sup> Cir. 1990); *In re Byington*, 197 B.R. 130, 134 (Bankr. D. Kan. 1996). As the legislative history of § 506(a) states:

“Value” does not necessarily contemplate forced sale or liquidation value of the collateral; nor does it always imply a full going concern value. Courts will have to determine the value on a case-by-case basis; taking into account the facts of each case and the competing interest in the case.

H.R. Rep. No. 95-595, at 356, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313.

As with so many cases coming before the Court in recent months, neither party in this action presented sufficient evidence regarding the value of the home at the time the case was filed. The tax

assessment offered by the debtor is based on an appraisal done in 2001. Washington Mutual's valuation was done on April 12, 2007, nearly two years after the case was filed. Additionally, Washington Mutual's valuation was based on a drive-by appraisal only which does not take into account the condition of the house on the inside. It could be that the debtor has made drastic upgrades to the house which would elevate its value or it could be that there are so many needed repairs that the value would be lower. While it is true that Washington Mutual's real estate agent stated that he did not think that the value of the Ripley property would have been much different in 2005, he did not testify as to a dollar amount nor did he testify as to how much specific difference there would have been in the 2005 housing market.

As it stands, the only figure in the record regarding the house's value at the time the case was filed is the value listed on the debtor's Schedule A. That figure is \$46,000.00. At no time has Washington Mutual filed an objection to this value. Based on the lack of relevant evidence in this case, the Court has no choice but to value the house at \$46,000.00 for purposes of this adversary proceeding. As a result of this decision, the debtor will be allowed to avoid Washington Mutual's second mortgage in the amount of \$11,323.04. Washington Mutual will continue receiving payments on this mortgage as an unsecured creditor.

#### **ORDER**

It is therefore **ORDERED** that Washington Mutual's lien encumbering the debtor's property in the amount of \$11,323.04 is **AVOIDED**.

It is **FURTHER ORDERED** that Washington Mutual's second mortgage in the amount of \$11,323.04 is to be paid as an **UNSECURED CLAIM**.

**IT IS SO ORDERED.**

**Mailing Information:**

Gerald Ketchum, attorney for debtor  
Joel Giddens, attorney for Washington Mutual  
Tim Ivy, Chapter 13 Trustee