UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:12-bk-18720-FMD
Chapter 7

Catherine Sroka,

Debtor.
_____/

**ORDER GRANTING AMENDED VERIFIED MOTION TO DETERMINE THE SECURED STATUS OF OLAF SROKA'S MORTGAGE AND TO STRIP LIEN(S) EFFECTIVE UPON DISCHARGE**

THIS CASE came on for final evidentiary hearing on March 25, 2014, of the Debtor's *Amended Verified Motion to Determine the Secured Status of Olaf Sroka's Mortgage and to Strip Lien(s) Effective Upon Discharge* (the "Motion")[1] and the Debtor's *Objection to Claim of Olaf Sroka (Claim No. 3-1)* (the "Objection").[2] The Court has considered the testimony of the witnesses, the exhibits introduced into evidence, the Debtor's Memorandum and Reply Memorandum,[3] and Olaf Sroka's *Memorandum of Law and Closing Brief in Response to Debtor's Memorandum of Law*.[4] For the reasons set forth below, the Court will grant the Motion and sustain the Objection.

**FINDINGS OF FACT**

A. The Debtor filed a petition for relief under Chapter 7 of the United States Bankruptcy Code[5] on December 13, 2012 (the "Petition Date").[6]

B. The Debtor owns certain non-residential real property, located at 1718 SE 47th Street, Cape Coral, Florida 33904, Strap No. 08-45-24-C4-00361.A470. This real property consists of two distinct sets of parcels:

(1) Lots 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54, Block 361-A, Cape Coral, Unit 7, a subdivision, according to the map or plat thereof, recorded in Plat Book 12, Page(s) 101-128, inclusive, Public Records of Lee County, Florida. Together with that portion of vacated alley located between Lots 46, 47, 48, 49 and 50, Block 361A, Unit 7, Cape Coral Subdivision, according to the map or plat thereof as recorded in Plat Book 12, Page(s) 101-128, inclusive, Public Records of Lee County, Florida, as described in Resolution Number 27-93 recorded in O.R. Book 2372, Page 1503, Public Records of Lee County, Florida (sometimes referred to herein as the "Original Collateral"); and

(2) Lots 55 and 56, inclusive, Block 361-A, Cape Coral, Unit 7, a subdivision, according to the map or plat thereof, recorded in Plat Book 12, Pages 101 through 128, inclusive, Public Records of Lee County, Florida (sometimes referred to herein as the "Additional Collateral").

The Original Collateral and the Additional Collateral are referred to collectively as the "Property."

C. On the Petition Date, the Property was encumbered by a first mortgage (the "Bank Mortgage") in favor of Community Bank of Cape Coral, later known as First Community Bank and succeeded as owner by C1 Bank.[7] For ease of reference, Community Bank of Cape Coral and C1 Bank are referred to collectively as the "Bank."

D. The Bank Mortgage was recorded on June 30, 2008, at Instrument Number 2008000175934, in the Recording Office of Lee County, Florida (the "Recording Office"). The Bank Mortgage

[1] Doc. No. 38.
[2] Doc. No. 41.
[3] Doc. Nos. 131, 135.
[4] Doc. No. 132.
[5] Unless otherwise stated, all statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*
[6] Doc. No. 1.
[7] Doc. No. 38, Ex. A.

secured a promissory note in the original principal amount of $530,000.00 (the "Bank Promissory Note").[8]

E. The Bank Mortgage was "corrected" by a document titled "Correction of Mortgage."[9] The Correction of Mortgage includes the Additional Collateral as collateral for the Bank Promissory Note.[10] It was recorded in the Recording Office on August 9, 2011, as Instrument Number 2011000178018.[11]

F. On the Petition Date, the Original Collateral was also encumbered by a mortgage in favor of Olaf Sroka recorded on July 24, 2008, in the Recording Office as Instrument Number 2008000199338 (the "Olaf Sroka Mortgage").[12] The Olaf Sroka Mortgage secures a promissory note with a principal balance of $235,000.00 (the "Olaf Sroka Note"). The Olaf Sroka Mortgage does not identify the Additional Collateral as collateral.[13]

G. On or about November 23, 2011, the Bank loaned the Debtor the additional sum of $41,482.10, as evidenced by the Future Advance Promissory Note (the "Advance Note").[14] The purpose of the future advance was to pay real estate taxes due on the Property. The Bank Promissory Note and the Advance Note were further secured by the Mortgage Modification and Spreader Agreement and Notice of Receipt of Future Advance dated December 2, 2011 (the "Spreader Agreement").[15] The Spreader Agreement modified the Bank Mortgage by confirming (1) that the Bank Mortgage secured both the Bank Promissory Note and the Advance Note and (2) that the lien created by the Bank Mortgage was secured by the Property, including the Additional Collateral.[16]

H. As of the Petition Date, the total amount due to the Bank, inclusive of interest and attorney's fees, on account of the Bank Promissory Note and the Advance Note was $640,138.31.[17]

I. Almost one year after the Petition Date, the Bank and the Debtor agreed to a modification of the Bank Promissory Note and the Bank Mortgage. The Debtor executed two promissory notes in the principal amounts of $74,189.59[18] and $507,553.74,[19] respectively (the "Bank Extension Notes"). On December 20, 2013, the Debtor executed a Modification of Mortgage that renewed and extended the indebtedness and the securitization of the Debtor's indebtedness to the Bank to the Property.[20] As a result of these postpetition adjustments, the total amount due to the Bank was reduced from $640,138.31 to $581,174.33.[21]

J. The Property's value on the Petition Date was either $604,000.00, as testified to by MAI-designated appraiser Gerald Hendry,[22] or $620,000.00, as testified to by Charles Watkins, a representative of the Lee County Property Appraiser's office.[23] This Court finds that both Mr. Hendry and Mr. Watkins are experts in the valuation of real estate in Southwest Florida. The Court further accepts the validity of the methodologies utilized and the quanta of data considered by Mr. Hendry and Mr. Watkins in reaching their conclusions as to the Property's value.

## CONCLUSIONS OF LAW

1. 11 U.S.C. § 506(a)(1) provides that an allowed claim of a creditor that is secured by a lien on a bankruptcy debtor's property is a secured claim to the extent of the value of the creditor's

[8] Doc. No. 108-1.
[9] Doc. No. 112-1.
[10] *Id.*
[11] *Id.*
[12] Doc. 111-1.
[13] *Id.*
[14] Doc. No. 113-1.
[15] *Id.*
[16] *Id.*

[17] Douglas Elliott Dep. Tr. 46:1–2, Mar. 15, 2014 (Doc. No. 127-1). Per a letter dated December 3, 2012, the Bank Mortgage totaled $639,229.05. Doc. No. 117. The Petition was filed ten days later. Doc. No. 1.
[18] Doc. Nos. 123-1.
[19] Doc. Nos. 124-1.
[20] Doc. No. 125-1.
[21] Doc. Nos. 123, 124.
[22] Mr. Hendry's official report is filed as Doc. No. 103-1.
[23] Hearing Tr. pp. 119-130 (Doc. No. 133) (testimony as to calculation of fair market value).

interest and is an unsecured claim to the extent that the value of the creditor's interest is less than the amount of the allowed claim.[24] In relevant part, § 506(d)(1) states that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void."[25] If a debtor attempts to void a lien but some equity exists in the collateral to cover a portion of the lienholder's entire debt, the debtor's action is commonly referred to as "stripping down."[26] If no positive equity exists to which a lien can attach, the debtor's effort to void the lien is known as "stripping off."[27]

2. In *Dewsnup v. Timm*,[28] the United States Supreme Court held that the phrase "allowed secured claim" in § 506(d)(1) should be read "term-by-term,"[29] as permitting the voiding of only a claim "that is, first, allowed and, second, secured."[30] Based on this analysis, *Dewsnup* read § 506(d)'s voiding language as applying solely to *disallowed* secured claims and held that a claim in a Chapter 7 case must be deemed secured if its holder has any "recourse to the underlying collateral."[31] In short, *Dewsnup* held that Chapter 7 debtor could not "strip down" a creditors' lien on real property to the judicially determined value of the creditor's collateral.[32]

3. In *McNeal v. GMAC Mortg., LLC (In re McNeal)*,[33] the Eleventh Circuit, notwithstanding the Supreme Court's analysis in *Dewsnup*. confirmed the continued vitality of its holding in *Folendore v. U.S. Small Bus. Admin. (In re Folendore)*.[34] In *McNeal*, the Eleventh Circuit held that because the *Dewsnup* ruling was expressly limited to *partially* undersecured junior liens, *Folendore*'s holding that a Chapter 7 debtor may strip off a *wholly* unsecured junior lien remains good law.[35] Accordingly, if the Olaf Sroka Mortgage was entirely unsecured on the relevant date, it may be avoided under § 506(d)(1).

4. But whether the Olaf Sroka Mortgage is deemed wholly unsecured or partially unsecured depends upon the date utilized for establishing the amount of the senior lien on the property: the claim secured by the Bank Mortgage. The Debtor asserts that the appropriate valuation date in this Chapter 7 case is the Petition Date. In contrast, Olaf Sroka advocates for a more flexible approach to fixing the date for and the amount of secured indebtedness. He asks the Court to utilize the date that the Debtor filed the Motion to determine the amount of the Bank's claim.

5. In *In re Valls*,[36] a Chapter 13 case, the court determined that the petition date is the appropriate date for valuation. In *Aubain v. LaSalle Nat'l Bank (In re Aubain)*,[37] also a Chapter 13 case, the court noted the need for flexibility but ultimately employed the petition date. In *In re Hales*,[38] the bankruptcy court in a Chapter 11 case held that the date of the relevant Chapter 11 plan's confirmation was the appropriate date for a valuation. And in *Prudential Ins. Co. of Am. v. City of Boston (In re SW Boston Hotel Venture LLC)*,[39] the First Circuit affirmed the bankruptcy court's ruling that the appropriate valuation date for ascertaining the amount of postpetition interest due to a secured creditor was the date on which the creditor's collateral was sold.[40] However, none of these cases, all cited by Olaf Sroka, addressed the issue of the date of valuation in a Chapter 7 case.

6. A survey of Chapter 7 cases, however, does reveal a decided judicial preference for the

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[24] Section 506(a)(1).
[25] *Id.* § 506(d)(1).
[26] *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 781 n.3 (4th Cir. 2001) (internal quotation marks omitted) (quoting *In re Fitzmaurice*, 248 B.R. 356, 357 n.2 (Bankr. W.D. Mo. 2000)).
[27] *Id.*
[28] 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992).
[29] *Id.* at 415.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 417.
[33] 735 F.3d 1263 (11th Cir. 2010), *reh'g denied*.
[34] 862 F.2d 1537 (11th Cir. 1989).
[35] *In re McNeal*, 735 F.3d at 1265–66 (construing *In re Folendore*).
[36] 2010 WL 2745951, at *1 n.1, 2010 Bankr. LEXIS 2190, at *1 n.1 (Bankr. S.D. Fla. July 6, 2010).
[37] 296 B.R. 624, 636 (Bankr. E.D.N.Y. 2003).
[38] 493 B.R. 861, 864 (Bankr. D. Utah 2013).
[39] 2014 WL 1399418, at *7, 2014 U.S. App. LEXIS 6768, at *23 (1st Cir. 2014).
[40] *In re SW Hotel Venture, LLC*, 460 B.R. 4, 32 (Bankr. D. Mass. 2011).

petition date as the appropriate date for purposes of valuing a creditor's collateral in a Chapter 7 case. For example, in *Young v. Camelot Homes (In re Young),*[41] the court held because "[t]he estate's interest in property . . . is established upon the commencement of the bankruptcy case," the value of the estate's interest should be fixed at its creation, i.e., the petition date. And in *Dean v. LaPlaya Inv., Inc. (In re Dean),*[42] the court stated that "[m]any courts have settled on the bankruptcy petition date as the proper date to value a debtor's property in the context of lien stripping" and describing "that line of cases is most persuasive."

7. Several conclusions may be drawn. In Chapter 11 cases, the valuation date appears fluid, with courts generally opting for one of four dates: the petition date, valuation hearing date, confirmation date, or plan's effective date.[43] Conversely, in Chapter 7 and 13 cases, courts overwhelmingly use the petition date as the benchmark for valuation.[44]

8. Consistent with the majority view, the Court finds that in a Chapter 7 case, the petition date is the appropriate one for valuation and determination of the senior indebtedness in this Chapter 7 case. Because the Petition Date is the relevant date for determining both the value of the Property and the amount of the senior indebtedness, the fact that the Debtor was able to restructure and reduce the obligation to the Bank almost a year after the Petition Date does not affect the unsecured status of the Olaf Sroka Mortgage.

9. Olaf Sroka also argues that the Bank's advance of $41,482.10 (reflected in the Advance Note) should not be given priority over his mortgage. But, the advance was made in order to pay property taxes that were then due and that would have been a lien on the Property senior to both the Bank Mortgage and Olaf Sroka Mortgage. Had the Bank foreclosed its interest in the Property on the Petition Date, Olaf Sroka's interest in the Additional Collateral would have been foreclosed out. Therefore, the amount of the advance is properly included in the total amount of the Bank's senior indebtedness.

10. For the foregoing reasons, the Court finds that on the Petition Date the Bank Mortgage on the Property secured an obligation of $640,138.31 and that the maximum value of the Property as of the Petition Date was $620,000.00. Because, on the Petition Date, the Bank Mortgage's senior lien exceeded the Property's highest proven value, the Court determines that the Olaf Sroka Mortgage, was fully unsecured as of the Petition Date.

Accordingly, it is

**ORDERED**:

1. The Motion is GRANTED.

2. The Objection is SUSTAINED, and Claim Number 3-1 filed by Olaf Sroka shall be treated as an unsecured claim in this Chapter 7 case.

3. The Olaf Sroka Mortgage recorded on July 24, 2008, at Instrument Number 2008000199338, in the official records of Lee County, Florida, shall be deemed void, and shall be extinguished automatically, without further court order, upon the recordation in the public records of a certified copy of this Order.

Dated: June 20, 2014.

/s/
Caryl E. Delano
United States Bankruptcy Judge

Attorney **Richard Johnston**, **Jr.**, is required to serve a copy of this order on interested parties and file a proof of service within three days of entry of the order.

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[41] 390 B.R. 480, 488 (Bankr. D. Me. 2008).
[42] 319 B.R. 474, 478 (Bankr. E.D. Va. 2004).
[43] *In re Lucero*, 2014 WL 2159553, at *4, 2014 Bankr. LEXIS 2293, at *11–12 (Bankr D.N.M. May 23, 2014); *Wood v. LA Bank (In re Wood)*, 190 B.R. 788, 790–91 (Bankr. M.D. Pa. 1996).
[44] *See, e.g.*, *Ford Motor Credit Co. v. Olson (In re Olson)*, 300 B.R. 96, 98 (Bankr. S.D. Ga. 2003); *W. Interstate Bancorp v. Edwards (In re Edwards)*, 245 B.R. 917, 919 (Bankr. S.D. Ga. 2000); *Riley v. Wisconsin Dep't of Rev. (In re Riley)*, 88 B.R. 906, 912 (Bankr. W.D. Wis. 1987); *Brager v. Blum (In re Brager)*, 39 B.R. 441, 443 (Bankr. E.D. Pa. 1984), *In re Gilpin*, 479 B.R. 905 (Bankr. M.D. Fla. 2011).