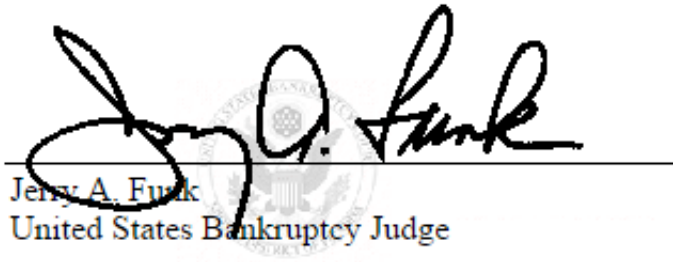
ORDERED.

Dated: May 22, 2017



UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:	Case No. 3:14-bk-5838-JAF
ROBERT ALAN SCHWEICKERT, JR.,	Chapter 13
Debtor.	

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ORDER DENYING MOTION TO VALUE CLAIM 2-1

This case came before the Court upon Debtor's Verified Motion to Determine Secured Status and Value (Cramdown) Creditor's Alex Pemberton, Mortgage Re Claim No. 2-1 (the "Motion to Value") (Doc. 135) and Creditor Alex Pemberton's Objection to [the Motion to Value] (Doc. 136). The Court conducted a hearing on the Motion to Value on March 22, 2017 and elected to take the matter under advisement. Upon a review of the applicable law, the Court finds it appropriate to deny the Motion to Value.

The following facts are undisputed. On December 2, 2014, Debtor filed this bankruptcy petition. On September 11, 2013, Debtor was granted a Chapter 7 discharge in a previous case, Case No. 6:13-bk-01918-CCJ. (Creditor's Ex. 1.) As a result,

pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible to receive a discharge in this case.[1]

Debtor owns real property located at 4915 S. Florida Avenue, Inverness, FL 34450 (the "Property") upon which Alex Pemberton (the "Creditor") holds a mortgage lien. The Property is investment property. Debtor owes at least $121,000.00 on the Property. Debtor alleges that as of the date of the petition, the Property was valued at $54,000.00 while the Creditor asserts the Property is worth at least $103,000.00. It is uncontested that the mortgage is not wholly unsecured.

The threshold legal issue before the Court is whether Debtor can strip down the Creditor's claim even though he is not eligible for a discharge in this Chapter 13 case. In In re Scantling, 465 B.R. 671, 673 (Bankr. M.D. Fla. 2012), Judge Williamson addressed the issue of whether a Chapter 13 debtor who received a Chapter 7 discharge less than four years prior to the commencement of her Chapter 13 case and was therefore not eligible to receive a discharge, could strip off a wholly unsecured junior mortgage lien on her homestead.[2] The court concluded that she could. Id. The court noted that the right to strip off a lien arises out of the interplay between § 506(a), which determines whether a claim is secured, and § 1322(b)(2), which permits a debtor to modify the rights of a secured claim holder as long as the claim is not secured by the debtor's principal residence. Id. at 677-678. Because, under § 506(a), a wholly unsecured junior mortgage is not a claim secured by the debtor's principal residence, a debtor can modify the rights of a wholly unsecured junior mortgagee in a Chapter 13 case. Id. at 678. The court noted

[1] Section 1328(f)(1) provides that a Chapter 13 debtor who has received a Chapter 7 discharge during the four year period preceding the filing of the Chapter 13 case is not entitled to receive a discharge in the Chapter 13 case.

[2] Such a debtor is colloquially known as a Chapter 20 debtor. In re Davis, 716 F.3d 331, 332 n.1 (4th Cir. 2013).

that cases which have held that a Chapter 20 debtor may not strip off a wholly unsecured junior mortgage rely on § 1325, which requires that a secured creditor retain its lien until the earlier of the payment of the underlying debt under non-bankruptcy law (i.e. the payment of the debt in full) or a Chapter 13 discharge. Id. at 678. Those cases reason that because a Chapter 20 debtor is not eligible for a discharge, a Chapter 20 debtor is unable to obtain confirmation of a plan that strips off a wholly unsecured junior mortgage. Id. Judge Williamson rejected the reasoning set forth in those cases. The court noted that § 1325(a)(5) applies only to allowed secured claims, and the holder of a wholly unsecured junior mortgage does not have a secured claim. Id. The court stated:

> [T]here is a difference between the term of art "secured claim," on the one hand, and the notion that a creditor has a security interest or lien outside of bankruptcy, on the other hand. Having a security interest or lien outside of bankruptcy is translated under bankruptcy laws as having the "rights" of a secured creditor, not necessarily as being the holder of a secured claim. Once a determination has been made under § 506 that the remaining in rem claim is wholly unsecured and that the creditor holds no secured claim in the bankruptcy case, the creditor is left with its non-bankruptcy rights. The debtor may then modify those "rights" under § 1322(b)(2) by voiding the security interest … Section 1325 would only apply where the debtor was attempting to restructure the payment terms of an allowed secured claim. Section 1325 does not apply where the debtor is simply modifying the state law lien rights of a creditor that does not hold an allowed secured claim under § 506. The power to modify comes from § 1322(b)(2)-not § 1325.

Id. at 680-681.

The decision was appealed directly to the Eleventh Circuit Court of Appeals. Noting that the bankruptcy court's opinion was thorough and well-reasoned, the Eleventh Circuit affirmed the decision by stating:

> We agree with the other circuits who have considered this issue that a debtor, in a Chapter 13 setting, may strip off an unsecured mortgage on the debtor's principal residence. This strip off is accomplished through the § 506 valuation procedure that determines that the creditor does not hold a secured claim. Once this determination has been made, pursuant to § 1322(b)(2), the creditor's "rights" are modified by avoiding the lien to which the creditor would otherwise be entitled under nonbankruptcy law. Under such analysis, § 1325(a)(5) is not involved, and the debtor's ineligibility for a discharge is irrelevant to a strip off in a Chapter 20 case. The BAPCPA did not amend §§ 506 or 1322(b), so the analysis permitting strip offs in Chapter 20 cases is no different than that in any other Chapter 13 case.

Wells Fargo Bank v. Scantling (In re Scantling), 754 F.3d 1323, 1330-1331 (11th Cir. 2014).

After the bankruptcy court decision in Scantling but before the Eleventh Circuit decision in Scantling, the Eleventh Circuit issued an unpublished decision holding that a Chapter 20 debtor was unable to strip down two under-secured first priority mortgage liens on two respective investment properties. Colbourne v. Ocwen (In re Colbourne), 550 F. App'x 687, 689 (11th Cir. 2013). The court noted § 1325(a)(5)'s source as a Chapter 13 debtor's authority to bifurcate a secured claim and to strip down the value of the claim to an amount equal to the value of the collateral. Id. The court also noted that § 1325(a)(5) specifies the manner in which secured claims must be dealt with in order for a Chapter 13 plan to be confirmed. Id. Specifically, § 1325(a)(5)(B) requires a Chapter 13 plan to provide that the holder of an allowed secured claim retain its lien until the earlier of the payment of the underlying debt as determined under non-bankruptcy law or a discharge under § 1328. Id.; § 1325. "Thus, where a debtor is ineligible for a discharge … the creditor retains its lien 'until the entire amount of the debt, calculated without

regard to the modifications permitted in bankruptcy, is paid.' Absent a discharge, 'any modifications to a creditor's rights imposed in the plan are not permanent and have no binding effect once the term of the plan ends.'" Id. at 689 (quoting In re Lilly, 378 B.R. 232, 235 (Bankr. C.D. Ill. 2007)). The Colbourne court was persuaded by the reasoning of several courts which had followed Lilly's reasoning and had concluded that debtors who are not eligible for a Chapter 13 discharge may not modify a secured creditor's rights through cram down or strip off. Id. at 690. The court held likewise. Id. The court recognized that while some courts have permitted lien stripping in Chapter 20 cases, the majority of those cases dealt with the strip off of wholly unsecured second priority liens on residences rather than the cram down of under-secured first priority liens on investment property and therefore found their guidance to be less applicable. Id. n.6.

The Court agrees with the reasoning and holding in Colbourne. Section 1325 is the source of a Chapter 13 debtor's authority to bifurcate a secured claim and to strip down the claim's value to the value of the collateral. Moreover, it sets forth the manner in which Chapter 13 secured claims must be dealt with in order for a Chapter 13 plan to be confirmed and requires a Chapter 13 plan to provide that the holder of a secured claim retain its lien until the earlier of the payment of the underlying debt as determined under non-bankruptcy law or a discharge under § 1328. Scantling, however, dealt with the strip off of a wholly unsecured lien rather than an under-secured lien. There, the court specifically noted the strip off was accomplished through §§ 506 and 1322 and that § 1325(a)(5) did not come into play. Accordingly, Scantling's holding has no effect on the instant case.

Although the Creditor's claim is under-secured, he is the holder of an allowed secured claim for purposes of § 1325(a)(5). Because Debtor is not eligible for a discharge in this case, § 1325(a)(5)(B) requires his Chapter 13 plan to provide that the Creditor retain his lien until the entire amount of the debt is paid. Upon the foregoing, it is

ORDERED:

1. The Motion to Value is denied.

2. The continued confirmation hearing and the hearing on Motion to Increase the Amount of Adequate Protection Payments are scheduled for June 26, 2017 at 2:30 p.m.

3. If Debtor wishes to amend his Chapter 13 plan as a result of this ruling, he must do so within fourteen days of the date of this Order.

Attorney Eric Kolar is directed to serve a copy of this Order on interested parties and file a proof of service within three days of entry of the Order.