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JAN 31 2011

United States Bankruptcy Court
San Jose, California

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re] Case No. 10-50394-ASW
]]
VICTORIANO AND ANNALIZA DUARTE,] Chapter 13
]]
Debtors.]

**MEMORANDUM DECISION RE MOTION TO DETERMINE VALUE
AND STATUS OF JUNIOR LIENHOLDER'S CLAIM**

Before the Court is the motion ("Motion") by debtors Victoriano and Annaliza Duarte ("Debtors") to determine the value and status of the second priority deed of trust held by creditors Duane E. Gifford and Marilyn L. Gifford ("Giffords") against the Debtors' primary residence located at 767 Lakehaven Dr. Sunnyvale, California 94089 ("Property"). Debtors seek a determination that the Giffords' second deed of trust is not secured in any amount and thus may be treated as unsecured in Debtors' chapter 13 plan. The Giffords oppose the Motion. Debtors are represented by Drew Henwood, Esq. of The Law Offices of Drew Henwood. The Giffords are represented by Benjamin R. Levinson, Esq. of the Law Office of Benjamin R. Levinson.

1 An evidentiary hearing on the Motion was held on September 2,
2 2010, and the matter has been submitted for decision. At the
3 evidentiary hearing, Debtor called Daniel Ordaz ("Ordaz"), an
4 appraiser, and Debtors as witnesses. The Giffords called Boris
5 Chtchetinin, an appraiser, as a witness.

6 This Memorandum Decision constitutes the Court's findings of
7 fact and conclusions of law, pursuant to Rule 7052 of the Federal
8 Rules of Bankruptcy Procedure.

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10 I.

11 FACTS

12 Debtors commenced this case by filing a petition under
13 Chapter 13 of the Bankruptcy Code on January 17, 2010. Debtors'
14 main asset is the Property. Debtors purchased the Property in 1996
15 and have lived at the Property continuously since the time of
16 purchase. Two deeds of trust have been recorded on the Property.
17 The senior obligation and first deed of trust on the Property is
18 held by US Bank National Association ("US Bank"). The Giffords are
19 the beneficiaries of a pre-petition loan made to the Debtors. The
20 Giffords' loan is secured by the second priority trust deed (the
21 "Giffords' Lien") against the Property.

22 On the bankruptcy petition date, January 17, 2010, the amount
23 owing to the first deed of trust holder US Bank was no more than
24 \$387,435.63 and that sum included advances by US Bank for payment
25 of real property taxes.¹ On March 3, 2010, Debtors filed the
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28 ¹ US Bank's proof of claim in the amount of \$387,435.63 was
submitted to the Court at the time of hearing and entered into
evidence. The Giffords do not contest that amount.

1 Motion. On March 12, 2010, the Giffords filed a Notice of
2 Opposition and Request for Hearing. The hearing, initially held on
3 June 7, 2010, was continued to September 2, 2010 for an evidentiary
4 hearing.

5 At the September 2, 2010 hearing, each party offered an expert
6 witness to opine as to the value of the Property at the time of
7 Debtors' bankruptcy petition. Both experts prepared written
8 reports and those reports were entered into evidence. Debtors'
9 expert witness Daniel Ordaz is an independent contract appraiser of
10 real property specializing in Santa Clara County. The Giffords'
11 expert witness Boris Chtchetinin is an owner and principal
12 appraiser for his own appraisal business, that operates throughout
13 the entire Bay Area but specializes in Santa Clara County. Both
14 appraisers were qualified to testify as experts concerning the
15 value of the Property. Debtor Annaliza Duarte testified as to the
16 condition of the Property on the petition date. Debtor Victoriano
17 Duarte testified as to the value and surroundings of the Property
18 on the petition date.

19 Ordaz holds a license from the State of California to conduct
20 real property appraisals which Ordaz obtained in September of 2006.
21 Ordaz estimated that Ordaz has done roughly 757 appraisals with 500
22 of those appraisals occurring in Santa Clara County. Debtors asked
23 Ordaz to determine the market value of the Property as of the
24 bankruptcy petition date, January 17, 2010.

25 Ordaz testified that Ordaz believed the fair market value of
26 the Property was \$370,000.00 as of January 17, 2010. Ordaz based
27 that conclusion upon a sales comparison analysis of four comparable
28 properties. Three of the properties were bank-owned properties,

1 i.e., the respective banks obtained these properties through
2 foreclosure and now offer the properties for sale. One of the
3 properties was a short sale. Ordaz determined that the value of
4 the Property was \$370,000 based on the sales comparison approach
5 and \$371,723 based on the cost approach.

6 Ordaz explained that a sales comparison approach to value is
7 based upon an analysis of comparable properties within the same
8 neighborhood in light of factors such as the real estate market of
9 the particular neighborhood, the school systems, and the dwelling's
10 characteristics including square footage, age, and condition.
11 Ordaz testified that the Property was in average condition. Of
12 particular note, Ordaz emphasized that all four of Ordaz's
13 comparables had closed escrow **prior to** January 17, 2010, and thus
14 the market would have been aware of those final sale prices at the
15 time of petition. Ordaz criticized Chtchetinin's report as
16 Chtchetinin's report consisted exclusively of sales that had closed
17 **after** Debtors' bankruptcy petition date.

18 As noted above, the Ordaz report contained three sales of
19 bank-owned properties and one short sale. The sales prices of the
20 Ordaz comparables ranged from \$366,860 to \$395,000 and were sold
21 between September 25, 2009 and January 13, 2010. The comparables
22 were located from .14 miles to .80 miles away from the Property.
23 Ordaz explained that Ordaz was unable to find any private sales
24 (i.e., sales that were not bank owned) or short sales among the
25 comparables in his research that were applicable and relevant.
26 Ordaz further stated that bank-owned property sales and short sales
27 were the predominant form of sale within the area of the subject
28 property and thus are valid comparables when those sales are the

1 dominant sales made within the neighborhood. Ordaz did not make
2 adjustments in sale price based on whether the comparable consisted
3 of a bank-owned property or short sale because Ordaz testified that
4 it is not standard industry practice to make such adjustments due
5 to the difficulty in objectively determining the value of the
6 adjustment.

7 Debtor Annaliza Duarte testified that around the time of the
8 bankruptcy petition, January 17, 2010, the Property suffered from
9 mold problems, the bathroom sink leaked, and that sink leak had
10 caused floor discoloration. Debtor Victoriano Duarte testified
11 that around the time of the bankruptcy petition, the neighborhood
12 was very busy as it is located close to a highway and there were
13 many cars parked along the street. Victoriano Duarte also
14 testified that a park and school are located behind the Property
15 with no other houses obstructing access.

16 Chtchetinin testified that Chtchetinin believed the fair
17 market value of the Property was \$395,000 as of January 17, 2010.
18 Chtchetinin based that conclusion upon a sales comparison analysis
19 based on comparable properties -- all of which had sold prior to
20 the court hearing but none of which had closed escrow at the time
21 of Debtors' bankruptcy petition. Chtchetinin reviewed three
22 comparable properties between .11 and .49 miles from the Property
23 -- two of the comparable properties were bank owned properties sold
24 after a foreclosure and one sold through a private sale.
25 Chtchetinin determined that the value of the Property was \$395,000
26 based on the sales comparison approach and was \$381,200 based on
27 the cost approach.

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1 Chtchetinin is a licensed appraiser in the state of California
2 and Chtchetinin has worked as a real estate appraiser for 6 years.
3 Chtchetinin's work is exclusively residential and he has worked
4 exclusively in Santa Clara County for the past three years.
5 Chtchetinin estimated that Chtchetinin has made over 2,500
6 appraisals. Chtchetinin testified that, unlike Ordaz who is
7 a trainee appraiser who works under the supervision of a licensed
8 or certified appraiser, Chtchetinin is qualified as a licensed
9 appraiser based on education and experience.

10 Chtchetinin explained that Chtchetinin had been engaged to
11 make a retrospective appraisal for the Giffords. Chtchetinin
12 testified that the residential tract where the Property was located
13 was fairly typical for a 1950's tract with homes generally in the
14 configuration of three bedrooms and two bathrooms. Chtchetinin
15 recalled the price range for the area at the time in question to be
16 between \$360,000 and \$460,000.

17 The adjusted sales price of the three comparable properties
18 Chtchetinin used in his report ranged from \$387,000 to \$403,000.
19 Chtchetinin testified that these three comparables in his report
20 represented the mid-range of value where the Property fit based on
21 condition; some other properties of superior quality were selling
22 for \$420,000 while some properties of lesser quality were selling
23 for \$360,000. Chtchetinin described the Property as average
24 condition with some interior updates such as laminate flooring,
25 limestone floors in some areas, wood cabinets, and granite counter
26 tops. Chtchetinin criticized the Ordaz appraisal arguing that the
27 Ordaz appraisal had used comparables of worse condition and on a
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1 lower scale of value, particularly with respect to the inclusion of
2 a comparable that was listed as a complete "fixer-upper".

3 Chtchetinin used sales which had not yet closed as of the
4 petition date in Chtchetinin's retrospective appraisal explaining
5 that while the sales did not close before the petition date,
6 Chtchetinin verified that the contract prices of the comparable
7 sales were also the final sales prices by cross checking the
8 contract price with the post bankruptcy petition property closing
9 price on the Multi Listing Service website. Chtchetinin stated
10 that the Multi Listing Service search function did not have a
11 feature to filter out properties that had not closed escrow prior
12 to the bankruptcy petition date. Chtchetinin testified that if
13 such filtering were necessary, it would need to be done manually by
14 the appraiser. Chtchetinin acknowledged that it is possible for
15 events to occur between the date of contract and the date of
16 closing that could change the final closing price. However,
17 Chtchetinin stated that those events did not occur here and that
18 the contract prices were representative of the market prices at the
19 time of Debtors' bankruptcy petition.

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21 II.

22 ANALYSIS

23 Debtors' Motion requests this Court to determine the value and
24 status of the Giffords' lien as wholly unsecured and void. Debtors
25 contend that the fair market value of the Property on the
26 bankruptcy petition date was less than the debt secured by US
27 Bank's first priority trust deed, thus the Giffords' Lien was
28 wholly unsecured at the time of bankruptcy. The Giffords oppose

1 the Motion arguing the fair market value of the Property exceeded
2 US Bank's first priority lien, thus Giffords' second priority trust
3 deed was at least partially secured and entitled to the
4 "antimodification" provision of Bankruptcy Code section 1322(b)(2).

5 Debtors seek to value the Giffords' Lien on the Property based
6 on Bankruptcy Code section 506(a)(1), which states:

7 An allowed claim of a creditor secured by a lien on
8 property in which the estate has an interest . . . is a
9 secured claim to the extent of the value of such
10 creditor's 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.

11 11 U.S.C. § 506 (a)(1). If the Court finds the Giffords' Lien to be
12 wholly unsecured, as Debtors contend, then the Giffords are not the
13 "holder[s] of a secured claim" whose rights are subject to the
14 "antimodification" protection of Bankruptcy Code section 1322(b)(2).
15 Zimmer v. PSB Lending Coporation (In re Zimmer), 313 F.3d 1220 (9th
16 Cir. 2002). The consequence of such a finding is that Debtors could
17 provide for the Giffords' claim through Debtors' chapter 13 plan as
18 a general unsecured claim, rather than a secured claim. Zimmer,
19 313 F.3d at 1227. Conversely, if the Court finds the Giffords' Lien
20 to be secured by even \$1.00, the "antimodification" protection of
21 Bankruptcy Code section 1322(b)(2) applies and the claim must be
22 paid as a secured claim and cannot be modified by Debtors'
23 chapter 13 plan.

24 Bankruptcy Code section 506(a)(1) instructs that when a court is
25 requested to determine the value of collateral, "such value shall be
26 determined in light of the purpose of the valuation and of the
27 proposed disposition or use of such property..." 11 U.S.C.
28 § 506(a)(1). When the debtors intend to stay in their house, the

1 proper valuation of the house under Bankruptcy Code section 506(a) is
2 the fair market value. Taffi v. United States of America (In re
3 Taffi), 96 F.3d, 1190, 1192 (9th Cir. 1996). The fair market value
4 is not the "replacement" value because the house is not being
5 replaced. Neither is it the "foreclosure" value because no
6 foreclosure is intended in the chapter 13 plan. Taffi, 96 F.3d at
7 1192.

8 The fair market value is "the price which a willing seller under
9 no compulsion to sell and a willing buyer under no compulsion to buy
10 would agree upon after the property has been exposed to the market
11 for a reasonable time." Taffi, 96 F.3d at 1192. Debtors intend to
12 stay in the Property, cure the loan owed to US Bank, and treat the
13 Giffords as general unsecured creditors.

14 For the purposes of granting or denying the Motion, this Court
15 does not need to determine the exact value of the Property. In re
16 Serda, 395 B.R. 450 (Bankr. E.D. Cal. 2008). The Court only needs to
17 determine whether or not the value of the Property at the time of
18 Debtors' bankruptcy petition was greater than, equal to, or less than
19 the amount of the senior secured debt owed to US Bank. Serda, 395
20 B.R. at 453. Here, the amount owing to the first deed of trust
21 holder was no more than \$387,435.63 on the bankruptcy petition date
22 and that sum included advances by that lender for payment of property
23 taxes. US Bank's proof of claim in the amount of \$387,435.63 was
24 submitted to the Court at the time of hearing and entered into
25 evidence without objection.

26 Debtors bear the initial burden of proof of overcoming any
27 presumption established by the stated value in the secured creditor's
28 proof of claim. Serda, 395 B.R. at 454. The secured creditor has