UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

MARTHA J. LEGAULT — Case No. 01-16175

Debtor

MARTHA J. LEGAULT

Plaintiff

-against- — Adversary No. 02-90169

FULL SPECTRUM LENDING, INC.

Defendant

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current issue before the court is whether there is any equity to attach to the mortgage lien of Full Spectrum Lending Inc. ("Creditor") against certain real property owned by Martha A. Legault ("Debtor"). The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), 157(b)(1), and 157(b)(2)(K).

FACTS

The court makes the following findings of fact based on the stipulation between the parties and the pleadings filed:

1. The Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on October 2, 2001.

2. The Association for Neighborhood Rehabilitation, Inc. ("ANR") and the Debtor entered into an agreement dated May 11, 1999, which provided $23,187 for the repair of the Debtor's residence located at 189 Dezell Road, Lisbon, New York (the "Property").

3. The agreement is delineated "Agreement - ANR Rehabilitation Grant" ("ANR Grant").

4. The ANR Grant was recorded in the St. Lawrence County Clerk's office on February 22, 2000 at Instrument No. 2000-00003191.

5. The County Clerk's office identifies the ANR Grant as a mortgage in the amount of $23,187.

6. The Creditor is a secured creditor of the Debtor by way of a note and mortgage against the Property executed by the Debtor on September 21, 2000 evidencing a debt in the principal sum of $26,000.

7. The Creditor recorded its mortgage in the St. Lawrence County Clerk's office at Instrument No. 2000-20355 on the 13th day of October, 2000.

8. The Debtor commenced this adversary proceeding to avoid Creditor's mortgage lien against the Property pursuant to 11 U.S.C. § 1322(b)(2) under the theory that it is wholly unsecured under 11 U.S.C. § 506.

9. The court issued a Memorandum-Decision and Order dated May 14, 2003[1] specifically finding that the Creditor's mortgage is junior to ANR's lien.

10. The court held a hearing on August 22, 2003 to determine the value of the Property and whether there is any equity for the Creditor's mortgage lien to attach to.

DISCUSSION

Section 1322(b)(2) of the Bankruptcy Code permits a debtor's Chapter 13 Plan to

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[1]Familiarity with this Decision is assumed. The Creditor filed an appeal which was ultimately dismissed because the Decision was found to be interlocutory rather than final.

"modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence..." 11 U.S.C. § 1322(b)(2). The Second Circuit concluded in *In re Pond*, 252 F.3d 122, (2nd Cir. 2001), that the antimodification exception of § 1322(b)(2) protects a creditors rights in a mortgage lien only where the debtor's residence retains enough value, after accounting for other encumbrances that have priority over the lien, so that the lien is at least partially secured under 11 U.S.C. § 506(a). *Id*. at 126. Pursuant to the reasoning of *In re Pond*, 252 F. 3d 122 (2d Cir. 2001), only a peppercorn of equity is needed to invoke the antimodification protection of 11 U.S.C. § 1322(b)(2). Thus, the precise question presented here is whether the Property is worth more than the balance of $23,187 due ANR on the first lien. If the Property is worth less than that amount, the Creditor is outside the safe harbor of § 1322(b)(2), and its rights may be modified because it is wholly "unsecured." In this case, that would mean that the Creditor's mortgage lien would be stripped from the Property, and the underlying claim would be reduced to unsecured status.

For the reasons that follow, the court finds that the value of the Property is greater than the balance of the first lien and, thus, the rights of the Creditor may not be modified. The Property is a modest residence in a rural area; both appraisers testified as much. The Debtor's expert, Mr. Allen Miller, opined the value of the Property to be $17,500 while the Creditor's counterpart, Mr. Joseph Siemutkowski, testified the Property is worth $31,000. The court takes issue with both appraisals.

Mr. Miller partially based his valuation on the age of the Property. Age in and of itself should not be a factor. Age should be a variable only when repairs and/or improvements are considered. A 200 year old property may be a rural horror or a smaller version of Mt. Vernon.

Some buyers would pay a premium for an older or historic home that has been maintained. While it would be unrealistic to suggest a premium for the Property, it is similarly unreasonable to arbitrarily devalue it based upon age alone. Mr. Allen used a figure of $25 per year of age difference between the Property and the comparables utilized.[2] This approach artificially lowers the value of the Property.

The court is also uncomfortable with the comparables utilized by Mr. Allen who was driven more by the age of the structures than by their location. Additionally, Mr. Allen, though he testified that he placed greater emphasis on the market comparison approach (Transcript pp. 13-15), also provided a cost analysis of value. Under his cost analysis approach, he places a price of $20 sq/ft for the costs of improvements. The court finds this amount unreasonably low casting further shadows of doubt on the judgments made and on the numbers and values used in Mr. Allen's market comparison approach.

The court does not wish to be unduly critical of Mr. Allen. However, the court is firmly convinced that the Property is worth more than the $17,500 value he testified to. It is difficult to quantify the arbitrary age factor utilized in the Allen appraisal. Therefore, the court will average the age differential amounts from the three comparables to arrive at an upward adjustment of $2,041.67.[3] This results in a base value of $17,500 plus $2,041.67, or $19,541.67. To this, the court will add 20% to compensate for the other problems discussed. This results in a final value of $23,450. This amount is $263 greater than the first lien of ANR.

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[2]The appraisal of Mr. Miller shows a negative adjustment of $2,125 for the 85 year differential of comparable one, $1,375 for the 55 year difference regarding comparable two, and $2,625 for the 105 year differential of comparable three.

[3]See Footnote 2.

Similarly, the court questions the reliability of Mr. Siemutkowski's appraisal which was done well over 1½ years post petition. During the interim, a deck was added to the Property and the furnace was replaced. The Creditor's expert obviously saw an improved version of the home examined by Mr. Allen, yet he testified that he believed his value of $31,000 would have applied with equal force on the filing date in October 2001 as well as to his visit to the Property in June 2003, notwithstanding the additions to the Property or the more favorable residential mortgage interest rates available in 2003. Mr. Siemutkowski also seemed relatively unconcerned by the unstable nature of certain outbuildings and any diminution of value attributable to them.

As with this court's discomfort of Mr. Allen's professed value of $17,500, it is similarly not comfortable with Mr. Siemutkowski's opinion of $31,000. The court finds the Property to be worth less than that amount. Because of the court's concern with the Siemutkowski appraisal, the court will deduct 25% or $7,750 to arrive at a value using the Creditor's approach of $23,250. This amount is $63 more than the first lien of ANR.

In summary, because the court finds equity above the first lien whether utilizing either appraisal, the Creditor's secured claim is protected by the antimodification exception of § 1322(b)(2) and may not be modified.

It is so ORDERED.

Dated: June 4, 2004

/s/ Robert E. Littlefield, Jr.
Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge