UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

JOHN WINNE and MARY I. WINNE — Case No. 02-15298, Chapter 13

Debtors.

JOHN WINNE and MARY I. WINNE,

Plaintiffs

-against- — Adv. Proc. No. 02-90298

CHARTER ONE BANK,

Defendant.

APPEARANCES:

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C. — Michael J. O'Connor, Esq.
Attorneys for Debtors/Plaintiffs
20 Corporate Woods
Albany, NY 12211

COOPER, ERVING & SAVAGE, LLP — Craig H. Norman, Esq.
Attorneys for the Defendant
39 North Pearl Street
Albany, NY 12207

ANDREA E. CELLI, ESQ.
Chapter 13 Standing Trustee
350 Northern Boulevard
Albany, NY 12204

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The Debtors filed the instant adversary proceeding. They seek a determination that Defendant's mortgage claim is wholly unsecured under section 506(a). The court has

jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(K) and 1334(b).

Facts

The Debtors filed their Chapter 13 petition on August 16, 2002. On Schedule A (Real Property), the Debtors stated their house had a value of $90,210. On Schedule D (Creditors Holding Secured Claims), they listed Chase Manhattan Mortgage Corporation's first mortgage in the amount of $106,650 and the Defendant's, Charter One Bank's, second mortgage in the amount of $26,820. On November 18, 2002, the court signed a conditional order lifting the automatic stay in favor of Chase.[1]

In their pretrial statement, the Debtors state the contested material facts before the court are the value of their house and whether Chase's first mortgage exceeds that value so as to permit "lien stripping" of Charter One's second mortgage. Charter One's pretrial statement indicates the contested legal issues are whether the Debtors, rather than the Chapter 13 Trustee, have standing to bring this adversary proceeding and whether *In re Pond*, 252 F.3d 122 (2d Cir. 2001) "is good law."[2]

At trial, the Debtors offered tax receipts they erroneously labeled as "Town of Colonie School Tax Bill for 2002-2003" and "Town of Colonie General tax bill for 2002 showing the full value assessment at $97,000." The Debtors also offered a copy of Chase's lift stay motion. That

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[1]The court has taken judicial notice of the documents referred to in this paragraph. Fed. R. Evid. 201. The court is not using the content of those documents to arrive at a conclusion of law regarding the value of the Debtors' house or the amount of Chase's secured claim; thus, the hearsay rule of evidence does not apply. FED. R. EVID. 801(c).

[2]In its post trial brief, Charter One explains that *Pond* did not hold that a Chapter 13 debtor can strip an unsecured mortgagee's lien before completing his plan. As discussed below, the court need not address that issue at this time.

motion contains allegations regarding the amount the Debtors owe Chase on its first mortgage.

Charter One objected to the admission of the Debtors' "tax bills" unless they agreed to the admission of New York's 2002 State Equalization Rate for the Town of Colonie and the Residential Assessment Ratio ("RAR") for the town. The Debtors objected to the admission of the equalization rate and the RAR on the grounds that the former was a composite of commercial and residential sales and the latter was based on a small sampling of real estate sales. The court reserved on the issue of whether to admit the 2002 "tax bills," the 2002 equalization rate, and the 2002 RAR.

During the trial[3], the Debtors' attorney asked Debtor John Winne three times what the Town of Colonie said his house was worth. Each time he was asked that question, the Debtor answered "$97,000." Charter One's attorney objected to the testimony on the grounds that the Debtor was testifying from a document not admitted into evidence, and the document itself was hearsay. The court reserved on ruling on the objections and allowed the Debtor's testimony to continue.

Debtor John Winne also testified that he did not agree with the town's $97,000 assessment. He stated his sink and pipes leaked, and the house had a warped garage door. He did not, however, quantify the dollar amount of those problems. He opined that a company called "Altek" caused residue to settle on his vinyl siding, but he did not quantify how much the residue devalued his house. He testified that some people in his neighborhood started a petition alleging they had "respiratory problems" due to the residue.

Debtor John Winne testified that he tried to sell his house for $100,000, and when he

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[3]The testimony offered at trial is based on the court's recollection and from listening to the tape recording of it. Neither party obtained a trial transcript.

received no offers, he dropped the price to $95,000 and then to $90,000. According to the Debtor, he never received a purchase offer. He did not provide any other testimony regarding the value of his house.

On cross examination, Debtor John Winne stated that he knew of a $97,000 appraisal Chase had done three years ago, but he did not have a copy of it. He testified that when he and his wife applied for a mortgage from Charter One, they used the value from Chase's appraisal on Charter One's mortgage application.[4]

Debtor John Winne admitted on cross examination that he was not an expert on valuing property. He stated he did not have any real estate training, and he had not bought or sold a lot of houses. When asked what a reasonable margin of error would be for valuing his property, he stated he did not know because he was "not in the appraisal business."

On cross examination, Debtor John Winne testified further about the defects in his house and his attempts to sell it. He stated the defects have existed for four or five years, and he admitted the last time he tried to sell it was eight years ago. He also admitted that he did not remember the value placed on his home for insurance purposes. He testified that his wife had a better recollection of such matters.

On redirect, Debtor John Winne stated there was one house on his street that sold. His only description of that property was "It was a HUD house."

Charter One called Debtor Mary I. Winne as a witness. She testified their fire insurance premium was part of the mortgage payment; she did not indicate which mortgage payment she

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[4]At the close of trial, Charter One's counsel informed the court that he could provide a copy of the Debtors' mortgage application. The court ruled that the trial record was closed and would not be reopened.

was referring to. She further testified that she did not know the value of the fire insurance policy.

Discussion

The Second Circuit has ruled that the antimodification exception of section 1322(b)(2) protects a creditor's 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 section 506(a). *Pond*, 252 F.3d at 126. A wholly unsecured claim is not protected under the antimodification exception of section 1322(b)(2). *Id*.

In a *Pond* adversary proceeding, the debtor has the burden of proving the mortgagee has a wholly unsecured claim. *See In re Dziendziel*, 2003 WL 21458708 (Bankr. W.D.N.Y.2003). Under Fed. R. Evid. 701, a property owner may testify as to his or her opinion of the property's value. *See In re Brown*, 244 B.R. 603 (Bankr. W.D. Va. 2000) and cases cited therein. Admission under Fed. R. Evid. 701 is limited to typical landowner type testimony, e.g. value based on the property's condition and purchase price, not evidence such as comparable sales data, which is considered expert witness type evidence. *In re Davis*, 17 B.R. 547 (Bankr. W.D. Mo. 1982). Of course, the court assigns the weight to be given to the debtors's testimony, even if it is uncontradicted. *See Brown*, 244 B.R. at 612. Thus, a debtor needs to offer sufficient testimony to establish in the court's mind an actual belief, derived from the evidence, as to the validity of the debtor's valuation opinion in order to carry the burden of proof. *Id.*

In this adversary proceeding, the court concludes the Debtors have not carried their burden of proof. The "tax bills" the Debtors offered at trial to prove the value of their house equaled the full value assessment they say the Town of Colonie performed in compiling the information contained in the documents are classic hearsay. The "tax bills" are out of court

statements the Debtors offered to prove the truth of the matter asserted. FED. R. EVID. 801(c). They have not shown these documents qualify as a "hearsay exception" under Fed. R. Evid. 803, 804, or 807; therefore, they are not admissible. Fed. R. Evid. 802.

Since the "tax bills" themselves are not admissible, the court cannot consider Debtor John Winne's testimony regarding their contents. As found above, the Debtor's attorney asked him several times what the Town of Colonie said his house was worth. To the extent the Debtor's testimony was based on the information contained in his "tax bills", the court will not consider it part of the record.

The court is also not convinced by Debtor John Winne's testimony regarding Chase's appraisal from several years ago. The court does not find such evidence persuasive, given its remoteness in time and that it stems solely from the Debtor's memory that an appraisal existed. It is particularly not convincing when the actual appraisal was easily attainable from Chase or its attorney.

Furthermore, while Debtor John Winne did mention some defects in his house, he did not estimate how much it would cost to fix them or explain why those defects lowered the value of his house. Given his failure to explain why he thought his house is worth no more than $97,000, other than his reliance on the inadmissable "tax bills," and his failure to explain why he thinks his house is actually worth less than the town's assessment because of its defects, his testimony is insufficient to carry the Debtors' burden here. Thus, the Debtors have not proven that Charter One has a wholly unsecured claim that they can lien strip under *Pond*. Finally, regarding the admissibility of the 2002 equalization rate and the RAR for the Town of Colonie, the court notes they also constitute hearsay. Charter One might have successfully argued they are "Public Records and Reports" that qualify as hearsay exceptions under Fed. R. Evid. 803(8). However,

since the Debtors have not carried their burden of proof, the burden did not shift to Charter One; thus, the court need not determine that legal issue at this time.

Accordingly, it is

ORDERED, that both the Debtors' and the Defendant's exhibits are deemed inadmissible; and it is further

ORDERED, that the instant adversary proceeding is dismissed.

Dated:
Albany, NY
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Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge - N.D.N.Y.