

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

DONALD W. PARKER and
ELLEN PARKER,

Chapter 7
Case No. 05-10576

Debtors.

APPEARANCES:

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

MEMORANDUM-DECISION AND ORDER

Donald W. Parker and Ellen Parker (“Debtors”) seek to void a lien on their residential property pursuant to the decision of the United States Court of Appeals for the Second Circuit in *In re Pond*, 252 F.3d 122 (2d Cir. 2001) (holding that a wholly unsecured mortgage lien may be stripped off in a Chapter 13 proceeding notwithstanding the antimodification exception of 11 U.S.C. § 1322(b)(2)). In order to grant the relief requested, the court must find that the fair market value of the Debtors’ residence located at 149 Bridge Avenue, Cohoes, New York (the “Subject Property”) exceeds the first mortgage lien and secured claim of Wells Fargo Bank, N.A. (“Wells Fargo”) in the

amount of \$65,313.98.

JURISDICTION

The court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(K) and (L), and 1334(b).

BACKGROUND

The Debtors filed a voluntary petition for Chapter 13 relief on February 2, 2005. On the Schedules and Statements required to be filed by 11 U.S.C. § 521 and Federal Rule of Bankruptcy Procedure 1007, the Debtors indicated that: (1) they were the joint owners of a “Two Family House” located at 149 Bridge Avenue, which had a fair market value of \$35,000; (2) Wells Fargo held a first mortgage on the Subject Property, which had a balance due of \$65,452 (the “Wells Fargo Mortgage”); and (3) Charter One Bank (“Charter One”) held a second mortgage on the Subject Property, which had a balance due of \$30,000 (the “Charter One Mortgage”).¹

On May 2, 2005, the Debtors filed a *Pond* motion seeking to value the Subject Property at \$35,000 and, based on such valuation, to obtain a declaration that the Charter One Mortgage was totally unsecured and Charter One’s lien void pursuant to 11 U.S.C. § 1322(b)(2).² (No. 17.) In support of their motion, the Debtors attached a January 31, 2005 letter opinion by Scott L. Bellcourt

¹ The court observes certain inconsistencies in the Debtors’ Schedules, including statements on Schedule D (Creditors Holding Secured Claims) that the Subject Property is a “Single Family House” valued at \$72,000 and Charter One’s claim is unsecured to the extent of \$23,452. The court, however, disregards these statements because they are controverted by the record in this case.

² This section permits a debtor to “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) (1994). As stated *supra*, the Second Circuit in *Pond* held that a wholly unsecured claim, otherwise secured by a mortgage on a debtor’s residence, is not protected under the Chapter 13 anti-modification provision of § 1322.

(“Bellcourt”), a New York State Certified General Appraiser and owner of Bellcourt Valuation Service, wherein he indicated that the Subject Property had a market value of \$35,000 as of January 19, 2005. No opposition was filed prior to the return date of the Debtors’ motion, and the motion was granted by Order dated June 1, 2005. (No. 23.)

Charter One filed a Proof of Claim (Claim No. 15) in the amount of \$30,508.03 on June 20, 2005.³ On August 15, 2005, Greco & Gess, P.C. (Eric A. Gess, Esq.) filed a notice of appearance on behalf of Charter One. (No. 33.) On the same date, Charter One moved to vacate the June 1, 2005 Order. (No. 34.) In support of its motion, Charter One submitted the competing appraisal of Frank Iafallo (“Iafallo”), of Northeastern Appraisal Associates, who valued the Subject Property at \$100,000 as of June 1, 2005 (the “Iafallo Appraisal”). Charter One’s motion was granted over the opposition of the Debtors’ counsel on September 26, 2005. The court subsequently issued a Scheduling Order setting a valuation hearing for October 21, 2005. (No. 42.)

On October 12, 2005, Wells Fargo filed a Proof of Claim (Claim No. 16) in the amount of \$65,313.98. Wells Fargo classified its claim as secured, and it attached copies of an October 31, 1997 deed and Mortgage in support of its claim.

In preparation for the valuation hearing, the Debtors submitted a more complete Appraisal Report by Bellcourt dated October 17, 2005 (the “Bellcourt Appraisal”). (No. 48.) The Bellcourt Appraisal valued the Subject Property in “as is” condition as of February 2, 2005 at \$45,000.

On October 21, 2005, the court conducted a valuation hearing on the Debtors’ motion at which Bellcourt and Iafallo testified as expert witnesses. The court did not hear testimony from the

³ The Proof of Claim erroneously classifies the debt due to Charter One as unsecured, non-priority. No supporting documents are attached to the Proof of Claim.

Debtors.

Bellcourt testified that: (1) he has appraised residential and commercial properties since 1983; (2) the Subject Property is a three-family dwelling, though only two units were habitable at the time of his inspection; he classified the first floor rear unit as “a complete shell” without the required Certificate of Occupancy; (3) he appraised the Subject Property as a two-unit dwelling and ignored the third unit because it wasn’t rentable; (4) the condition of the Subject Property was fair to poor; (5) the Subject Property included a dilapidated storage structure, and given the measurements and condition of the structure, it would not be suitable for a garage; (6) he relied more heavily on the sales comparison approach than on the income approach; (7) using the sales comparison approach, he chose three comparable sales that he believed were similar in location and condition to the Subject Property; (8) he did not believe that comparable sales from February 10, 2004, May 28, 2004, or June 25, 2004, were outdated; (9) in his opinion, there is “no difference” between downtown Cohoes and Van Schaick Island; (10) although he considered comparable sales located on Van Schaick Island, he instead chose three comparable sales located in other Cohoes neighborhoods; and (11) he believed the Subject Property’s assessed value of \$72,300 was very high.

Iafallo testified that: (1) he has been employed as a Certified Residential Appraiser by Northeastern Appraisal Services for approximately 3 years; (2) at the time of his inspection, the Subject Property was in move-in condition and it included an unfinished, partially renovated third unit; (3) he believed the sales comparison approach was more accurate than the income approach; (4) in his opinion, property located on Van Schaick Island is more desirable than property located in other areas of Cohoes because Van Schaick Island is more residential than other Cohoes

submarkets; (5) he chose a comparable sale within one year of his appraisal that was located approximately one block from the Subject Property on Van Schaick Island; he believed that comparable sale was the best indicator of fair market value for the Subject Property because of its similar bedroom count and location; and (6) the Subject Property included a garage that could be converted from a storage area to a working garage with minimal effort.

At the conclusion of the hearing, the parties were given an opportunity to submit post-trial memoranda on the effect, if any, of (1) the dates of the Bellcourt and Iafallo Appraisals, and (2) the dates of the experts' selected comparable sales on the court's determination. The parties did not submit post-trial briefs.

ARGUMENTS

The Debtors argue that the Subject Property must be valued as of the petition date. As a result, they contend that they should not be penalized for improvements made to the Subject Property after inspection by Bellcourt but before inspection by Iafallo. It is the Debtors' position that Charter One should not receive credit for any post-petition improvements leading to the appreciation of the Subject Property.

Charter One contends that, even if a discount were applied for the value of the alleged post-petition improvements, the value of the Subject Property would still exceed the amount of the Wells Fargo Mortgage. Charter One asserts that Bellcourt should have ascribed some value to the unfinished first floor rear unit. In addition, Charter One argues that the Iafallo Appraisal is more accurate than the Bellcourt Appraisal because the Bellcourt Appraisal does not account for the Subject Property's Van Schaick Island address.

DISCUSSION

Pursuant to the Second Circuit's holding in *Pond*, "if there is no equity in a debtor's residence after accounting for other encumbrances that have priority over a mortgage lien, that lien can be avoided and the mortgage debt treated as unsecured." *In re Dziendziel*, 295 B.R. 184, 187-88 (Bankr. W.D.N.Y. 2003). In a *Pond* proceeding, the burden is on the debtor to demonstrate that there is not even \$1.00 of value over prior valid liens to support the mortgage lien to be avoided. *Id.* at 188.

In the present case, the court finds the Debtors have not met their burden. The court has carefully reviewed both the Bellcourt and Iafallo Appraisals and it finds that they differ in four important respects. First, the Bellcourt Appraisal values the Subject Property as of the petition date, February 2, 2005, while the Iafallo Appraisal values the Subject Property as of October 11, 2005, approximately eight months after the Debtors' filing. Second, the Bellcourt Appraisal states that "[t]he rear studio was in shell-like condition, with no rentability" and no impact on value, while the Iafallo Appraisal considers the first floor rear unit "a viable living area for tenants." Third, the Iafallo Appraisal includes at least one comparable sale for property located on Van Schaick Island; none of the comparable sales included in the Bellcourt Appraisal are located on Van Schaick Island. Finally, the Bellcourt Appraisal does not include a garage, but the Iafallo Appraisal does.

While the court does not entirely agree with Iafallo's appraised value of \$100,000, for the foregoing reasons, it believes that the Subject Property is worth \$85,042.50. The court agrees with Iafallo that the most relevant indicator of market value for the Subject Property is Iafallo's comparable sale number 1 ("Comp. 1"); the court's starting point, therefore, is the value of Comp. 1, or \$100,050. The court is influenced by Iafallo's testimony that property located on Van Schaick

Island is worth more than property located in other submarkets of Cohoes and, as a result, potential home buyers may pay a premium for the Subject Property. The court believes that the Subject Property's location has a positive impact on value given that Van Schaick Island is primarily residential and, as shown by the map provided in the Bellcourt Appraisal, it is home to the Van Schaick Island Country Club. Comp. 1 is located one block from the Subject Property on Van Schaick Island; it is a three family dwelling; its square footage is 2,112 square feet, or approximately 556 square feet less than the Subject Property; and it includes a two car garage. Of all the comparable sales submitted, the features of Comp. 1 most closely match those of the Subject Property.

The court, however, finds that certain downward adjustments to Comp. 1 are required given the uncertainty about the number and value of improvements, if any, completed by the Debtors between the inspection by Bellcourt and the inspection by Iafallo. Without the Debtors' testimony, it is impossible for the court to determine exactly what improvements were made to the first floor rear unit. Photographs of the Subject Property's interior included in the Iafallo Appraisal documented several defects, including missing flooring, drywall, and carpeting. Thus, appreciation due to improvements or renovation cannot be precisely ascertained. The court is certain, however, that Iafallo properly ascribed some value to the third floor rear unit given its potential to draw income once the renovations are completed; the Bellcourt Appraisal did not account for the third floor rear unit at all. Moreover, general market appreciation cannot be ascertained because neither party provided statistical data on the real estate market for the period in question.⁴

⁴ A debtor obviously has the advantage of pre-bankruptcy planning and it is, thus, not surprising that a debtor's expert will value the real property as of the petition date. In most cases, prudent creditor counsel will advise his or her expert to do the same even though the

To account for these deficiencies in the record, the court discounts the Comp. 1 value by 10%. Based on the experts' differing opinions about the potential for a working garage on the Subject Premises, the court finds that an additional downward adjustment of 5% from the Comp. 1 value is warranted. Although the court does not believe that the Subject Property is equal in value to Comp. 1, in the court's opinion, a 15% downward adjustment is reasonable and it results in a realistic fair market value price of \$85,042.50.

CONCLUSION

Based on the foregoing evidence, the Debtors have not met their burden to demonstrate that there is no value in the residence over the Wells Fargo Mortgage, so the Charter One Mortgage cannot be stripped. Accordingly, it is hereby

ORDERED, that the Debtors' motion is denied.

Dated: 2/14/06
Albany, New York

/s/ Robert E. Littlefield, Jr.

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

creditor may not have access to the property in question until a dispute arises.