



SO ORDERED,

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: April 28, 2015**

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

SADKA HOLDINGS, LLC,

CASE NO. 14-01679-NPO

DEBTOR.

CHAPTER 11

ORDER SUSTAINING OBJECTION TO CONFIRMATION OF PLAN

This matter came before the Court for hearing on April 14, 2015 (the “Hearing”) on the Objection to Confirmation of Plan (the “Objection”) (Dkt. 80) filed by Bayview Loan Servicing, L.L.C., as servicer for the Bank of New York Mellon fka the Bank of New York, as Trustee for the Certificate Holders of the CWMBS Inc. CHL Mortgage Pass-Through Trust 2006-HYB1, Mortgage Pass Through Certificates, Series 2006-HYB1 (“Bayview”) in the above-referenced chapter 11 bankruptcy case (the “Bankruptcy Case”). At the Hearing, Laura Henderson-Courtney represented Bayview; Craig M. Geno represented the debtor, Sadka Holdings, LLC (the “Debtor”). The issue here is the valuation of residential property that serves as collateral for the indebtedness owed by the Debtor to Bayview. Having considered the Objection, as well as the testimony, exhibits, and arguments of counsel presented at the Hearing, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) and (L). Notice of the Objection was proper under the circumstances.

Facts

1. The Debtor is a North Carolina limited liability company formed to manage and rent residential property in and near Charlotte, North Carolina. On November 14, 2005, the Debtor purchased a house at 218 Stillwell Oaks Circle in Charlotte, North Carolina (the “Stillwell Property”).

2. To finance the purchase of the Stillwell Property, the Debtor executed an Adjustable Rate Note (the “Note”) in the original principal amount of \$87,500.00 payable to American Home Mortgage Acceptance, Inc. The Note is secured by a deed of trust (the “Deed of Trust”) encumbering the Stillwell Property. The Deed of Trust was assigned to the Bank of New York Mellon on October 9, 2013, and Bayview is the servicer for the Bank of New York Mellon.

3. On May 22, 2014, the Debtor filed a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code (Dkt. 1).

4. On August 19, 2014, the Debtor filed its disclosure statement (Dkt. 49; Debtor Ex. 1)¹ and plan of reorganization (the “Plan”) (Debtor Ex. 2). In the Plan, the Debtor proposes to pay Bayview the secured portion of its claim, \$51,000.00, in monthly installments amortized over twenty (20) years with interest at the rate of 2.65%, the interest rate set forth in the Note.

¹ The Debtor’s exhibits are cited as “(Debtor Ex. ____)”, and Bayview’s exhibits are cited as “(Bay. Ex. ____)”.

5. On August 28, 2014, Bayview filed a proof of claim (POC 1-1) asserting a secured claim of \$91,709.73 in the Bankruptcy Case.

6. On December 15, 2014, Bayview filed its Objection disputing the Debtor's valuation of the Stillwell Property in the Plan and arguing that the Plan does not treat Bayview fairly and equitably as required by 11 U.S.C. § 1129(b)(2).² Bayview voted to reject the Plan (Debtor Ex. 4).

Debtor's Valuation: Sadka

7. In support of its valuation of the Stillwell Property in the Plan, the Debtor presented the testimony of David John Sadka ("Sadka"), the sole owner and manager of the Debtor.

8. The Stillwell Property is a three (3) bedroom, one (1) bathroom house built in 1939 on 2.32 acres of land that, according to Sadka, is in need of costly repairs, including repairs to the roof, windows, electrical wiring, and foundation.

9. Sadka testified that the neighborhood surrounding the Stillwell Property is "rough" and remarked that a former tenant of the Debtor had been murdered. Although he could not recall where exactly the murder took place, he noted that it did not occur on or near the Stillwell Property.

10. According to Sadka, the Stillwell Property currently is occupied by tenants who pay the Debtor \$770.00 per month under a month-to-month tenancy.

² From this point forward, all references to code sections are to title 11 of the U.S. Code unless otherwise noted.

11. Sadka was not qualified as an expert on real estate valuation but based on his personal familiarity with the Stillwell Property as the property manager and owner of the Debtor, he testified that in his lay opinion the value of the Stillwell Property is \$51,000.00.³

Bayview's Valuation: Frazier

12. Bayview presented the expert testimony of Lisa C. Frazier ("Frazier"), an appraiser licensed in North Carolina who was qualified as an appraisal expert without objection. Frazier has conducted appraisals for approximately twenty-five (25) years.

13. Frazier prepared an initial appraisal of the Stillwell Property in October 2014 (the "October 2014 Report") (Bay. Ex. 1) in which she opined that the market value of the Stillwell Property is \$78,000.00.

14. After becoming aware of the need for additional repairs to the Stillwell Property, Frazier prepared an updated appraisal effective March 4, 2015 (the "March 2015 Report") (Bay. Ex. 2) in which she opined that the value of the Stillwell Property is \$69,000.00. Because the relevant value of the Stillwell Property is the effective date of the Plan, the Court focuses its attention on the March 2015 Report which is closer in time to that date than the October 2014 Report. *See* 4 COLLIER ON BANKRUPTCY ¶ 506.03[10] (16th ed. 2015).

15. Frazier explained at the Hearing that she arrived at a valuation of \$69,000.00 in the March 2015 Report using the "sales comparison" approach. She considered three (3) properties as comparable sales with adjustments. Their sales prices, as adjusted, were \$58,500.00, \$68,000.00, and \$105,000.00. All three properties are more than one (1) mile away

³ Rule 701 of the Federal Rules of Evidence allows lay witnesses to offer opinion testimony when it is based on personal perception and is helpful to the fact finder. *See* FED. R. EVID. 701; *Miss. Chem. Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 373 (5th Cir. 2002); *see also Nat'l Hispanic Circus, Inc. v. Rex Trucking, Inc.*, 414 F.3d 546, 551-52 (5th Cir. 2005) (FED. R. EVID. 701 allows testimony by corporate officers of business owners on matters that relate to their business affairs).

from the Stillwell Property. Frazier considered the homes listed in the first and second comparables to be the most similar to the Stillwell Property. The size of the living area of the Stillwell Property is 1,261 square feet in comparison to the living area of the homes in the first and second comparable sales is 1,096 and 1,018, respectively. In contrast, the living area of the home in the third comparable sale is 1,448 square feet, larger than that of the Stillwell Property. Only the home in the first comparable sale has the same number of bedrooms and bathrooms as the Stillwell Property.

16. With respect to the condition of the Stillwell Property in the March 2015 Report, Frazier gave both the Stillwell Property and the home in the first comparable sale a rating of “C5.”⁴ The C5 rating is defined in the March 2015 Report as reflecting that the home needs “[s]ome significant repairs . . . due to the lack of adequate maintenance” and “many of [the property’s] short-lived building components are at the end of or have exceeded their physical life expectancy but remain functional.” (Bay. Ex. 2 at 9). This definition provides an adequate summary of Frazier’s testimony about the condition of the Stillwell Property and reveals the nature of Bayview’s disagreement with the Debtor’s valuation of the Stillwell Property in the Plan. Whereas Frazier considered the Stillwell Property to be functional “as is,” the Debtor

⁴ The C5 rating in the March 2015 Report reflects a downgrade in the condition of the Stillwell Property from “C4” in the October 2014 Report. The “C4” rating is defined as a home with “some minor deferred maintenance and physical deterioration due to normal wear and tear.” (Bay. Ex. 1 at 7). A “C4” home is described in more detail as follows:

The dwelling has been adequately maintained and requires only minimal repairs to building components/mechanical systems and cosmetic repairs. All major building components have been adequately maintained and are functionally adequate.

(*Id.*).

maintained that the Stillwell Property was in dire need of extensive and, consequently, expensive repairs in order to render it marketable and/or inhabitable.

17. Turning to the parties' disagreement about the nature and urgency of certain repairs, the Court notes that before preparing the March 2015 Report, Frazier met with Dale Simpson ("Simpson"), a building contractor who routinely performed work for Sadka and the Debtor maintaining and renovating residential property.⁵ Frazier conducted a visual inspection of the interior and exterior of the Stillwell Property accompanied by Simpson in March 2015. In the Supplemental Real Estate Owned Appraisal Addendum in the March 2015 Report, Frazier provided an itemized list of repairs that she estimated would cost \$17,503.00. (Bay. Ex. 2 at 20). The repairs to the interior of the house included refinishing the hardwood floors, replacing the vinyl floor coverings, painting the interior walls, and replacing the wainscot, tub, and plumbing in the bathroom. The repairs to the exterior of the house included replacing the wooden deck and rotting window sills, removing a downed tree, and repairing the foundation under the laundry room.

Debtor's Valuation: Simpson

18. In rebuttal to Frazier's testimony, the Debtor presented the testimony of Simpson, who was qualified as an expert in building construction in the greater Charlotte, North Carolina area without objection. Simpson has been a contractor for twenty-five (25) years and has owned his own contracting business for fifteen (15) years. His testimony about the condition of the Stillwell Property centered on the roof, windows, foundation, and electric meter box.

19. Simpson stated that the roof was fifteen (15) to twenty (20) years old and had sustained hail damage, as evidenced by the number of "spots" or indentations on the shingles and

⁵ Sadka testified that he owned and/or managed seventeen (17) to eighteen (18) residential homes in North Carolina.

the shape of the dents in the roof turbine vent. (Debtor Ex. 5). Photographs supported his testimony about the hail damage and showed a rectangular area of discoloration where some of the shingles had already been replaced. (*Id.*). Although Simpson did not see any active leaks in the roof during his inspection and had not been told by any tenant that there were any leaks, he offered his opinion that the roof required immediate replacement and estimated the cost of doing so at \$4,500.00. Simpson also testified, however, that he was not aware of whether any insurance claim has been made regarding the purported hail damage to the roof.

20. Simpson testified that all ten (10) of the exterior windows needed to be replaced at a cost of \$225.00 each. He pointed to photographs that he stated showed missing or cracked window panes. (Debtor Ex. 6) He also testified that the window sills had rotted and needed to be replaced. With respect to the condition of the window sills, his testimony was the same as Frazier's.

21. As shown in the photographs included in the March 2015 Report, the house sits on a gentle slope. (Bay. Ex. 2 at 12). At the back corner of the house is the laundry room that is supported above ground by four (4) wooden posts. Under the laundry room, pipes are visibly exposed. (Debtor Ex. 7). Simpson stated his belief that the foundation does not conform to the structural standards of the city's building code, but he could not cite to a specific provision in the code violated by the exposed pipes or the posts and admitted he is not an expert in building code enforcement. He estimated the cost of foundation repairs to be \$8,500.00. In comparison, Frazier estimated the costs at only \$4,000.00.

22. Simpson testified that the electric meter box on the exterior of the house needed upgrading. (Debtor Ex. 8). Without the necessary repairs at an estimated cost of \$2,500.00, the

electric meter box could pose a hazard, according to Simpson. Also according to Simpson, other repairs were necessary to the kitchen cabinets, bathroom tile, and bathroom walls.

23. Simpson admitted that he lacked any expertise in determining how the repairs he believed were necessary impacted the value of the Stillwell Property, and he offered no opinion on the market value of the Stillwell Property.

24. Simpson expressed his concern that a building code enforcement officer would “fail” the Stillwell Property and Sadka would face stiff civil penalties if repairs were not made immediately. Again, he did not specify the alleged building code violations and did not explain why Sadka had not already made arrangements for the repairs necessary to comply with local law.

25. At the Hearing, the parties agreed that the Debtor would pay the value of the Stillwell Property over twenty (20) years at the agreed interest rate of 4.75%, which is higher than the 2.65% contract rate of interest. The only issue before the Court with regard to both the Objection and confirmation of the Plan is the fair market value of the Stillwell Property under § 506(a)(1). The Debtor contends that the value is \$51,000.00 as reflected in its Plan; Bayview maintains that the value is \$69,000.00 as set forth in the March 2015 Report.

Discussion

Under § 506(a), “[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property.” 11 U.S.C. § 506(a)(1). Moreover, the value of the property must be determined “in light of the purpose of the valuation and of the proposed disposition or use of such property.” *Id.* Here, the reason for determining the value of the

Stillwell Property is confirmation of the Plan and the proposed use by the Debtor is the retention and management of the Stillwell Property.

For a “cram down” plan to be considered fair and equitable, § 1129(b)(2)(A)(i) requires that a secured creditor retain its lien and receive “deferred cash payments totaling at least the allowed amount of such claim.” 11 U.S.C. § 1129(b)(2)(A)(i). Deferred cash payments consist of an appropriate interest rate and an amortization of the principal amount which constitutes the secured claim. As the proponent of the Plan, the Debtor bears the burden of demonstrating that the Plan meets all of the requirements of § 1129(b) and, accordingly, must prove its valuation of the Stillwell Property by a preponderance of the evidence. *Heartland Fed. Savs. & Loan Ass’n v. Briscoe Enter., Ltd. (In re Briscoe Enter. Ltd.)*, 994 F.2d 1160, 1165 (5th Cir. 1993); *see also Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P’ship (In re T-H New Orleans Ltd. P’ship)*, 116 F.3d 790, 801-03 (5th Cir. 1997).

Section 506 does not set forth the method for the valuation process. That determination hinges upon a case-by-case inquiry. 4 COLLIER ON BANKRUPTCY ¶ 506.03[6] (16th ed. 2015). Among the traditional methods used in determining an appropriate value for property are the cost, income, and comparable sales approaches. *In re Grind Coffee & Nosh, LLC*, No. 11-50011-KMS, 2011 WL 1301357, *6 (Bankr. S.D. Miss. Apr. 4, 2011) (citation omitted). The Court notes at the outset that the valuation of property is not an exact science and courts are often required to sift through conflicting testimony. *In re Simons*, 113 B.R. 942, 947 (Bankr. W.D. Tex. 1990) (“Valuation is not an exact science, and the chance for error always exists”).

Other than Sadka’s lay testimony that was based on his role as owner and property manager, the Debtor did not present any evidence supporting its valuation of the Stillwell Property at \$51,000.00. Instead, the Debtor attacked the March 2015 Report by pointing out

repair costs omitted by Frazier, such as the cost for a new roof, or arguing that she underestimated the costs for certain repairs. The Court, however, finds that making any dollar for dollar adjustments to the \$69,000.00 appraised value would result in “double dipping” since Frazier had already adjusted the value of the Stillwell Property to account for its “C5” condition.

Although it is undisputed that the Stillwell Property is in a state of neglect, many of the repairs, such as painting the interior walls and replacing the vinyl flooring, are matters of routine maintenance. Frazier’s testimony provided an overall accounting of the condition of the Stillwell Property whereas Simpson’s testimony promoted an overall improvement plan. In that regard, the Court does not find credible Simpson’s testimony that all of the repairs were equally necessary and urgent. When pressed on cross examination, Simpson testified that all the repairs “could wait,” but that it was “illogical” to do so. But the Court finds it illogical to conclude that a defective electric meter box and peeling paint would demand the same immediate attention from a prudent homeowner or investor in residential property. The Court does not question Simpson’s expertise in these matters but finds fault with his failure to discriminate between those repairs that are urgent to render the Stillwell Property safe from those needed to improve the Stillwell Property in order to bring a higher rental income. Moreover, Simpson’s testimony ignored the fact that the Stillwell Property is currently occupied and generating rental income for the Debtor. Finally, assuming that Sadka and Simpson are correct and immediate repairs are necessary, the Debtor, as a debtor-in-possession, should have undertaken corrective action during the chapter 11 case and certainly prior to the Hearing. The Debtor’s intentional failure to act while the Stillwell Property continued to deteriorate and to present a potentially hazardous condition in order to take full advantage of the cram down option by achieving the lowest possible value would violate the duty of the Debtor to propose a plan “in good faith and not by

any means forbidden by law.” 11 U.S.C. § 1129(a)(3); *W. Real Estate Equities, L.L.C. v. Vill. at Camp Bowie I, L.P.*, (*In re Vill. at Camp Bowie I, L.P.*), 710 F.3d 239, 247-48 (5th Cir. 2013) (evaluating good faith in light of the totality of the circumstances).

In summary, Simpson did not place a market value on the Stillwell Property and did not establish a proper connection between the market value of the Stillwell Property and the estimated repair costs. Frazier’s March 2015 Report succeeded in making that connection, and for that reason, the Court finds that the March 2015 Report represents an appropriate market value of the Stillwell Property. In short, the March 2015 Report appraises the current condition of the Stillwell Property, not its improved condition.

Having made its determination based on Frazier’s expert testimony, the Court nevertheless cannot ignore Simpson’s testimony that there may be a defect in the electric meter box of the Stillwell Property and a structural problem in its foundation that could pose a safety hazard to its occupants. Therefore, the Court notifies the City of Charlotte by copy of this Opinion (mailed to the City of Charlotte, Neighborhood and Business Services Code Enforcement, 600 E. Trade Street, Charlotte, NC 28202) of the need for an inspection of the Stillwell Property and other real property owned by the Debtor in Charlotte, North Carolina. According to Schedule A of the Debtor’s bankruptcy schedules (Dkt. 22), the street addresses of these properties, including the Stillwell Property, are: 218 Stillwell Oaks, 1320 Camp Greene, 1109 Vanizer, and 823 Everett.

Conclusion

The Court concludes that the value of the Stillwell Property established by a comparable sales analysis is \$69,000.00, and, accordingly, the amount of Bayview’s allowed secured claim is \$69,000.00. Confirmation of the Plan is conditioned on the Debtor making all repairs necessary

to the Stillwell Property and all other residential property owned by the Debtor to conform to the applicable building code.

IT IS, THEREFORE, ORDERED that the Debtor shall submit a confirmation order within fourteen (14) days of this Order that requires the Debtor to pay Bayview \$69,000.00 for its secured claim amortized over twenty (20) years with an interest rate of 4.75% and shall attach to that confirmation order a copy of this Order.

##END OF ORDER##