

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

CATHERINE M. MOORER

Case No. 02-13143

Debtor.

CATHERINE M. MOORER

Plaintiff,

v.

Adv. No. 02-1156

CITIFINANCIAL CORPORATION

Defendant.

**ORDER DETERMINING THAT DEBTOR LACKS STANDING
TO STRIP OFF CREDITOR'S SECOND MORTGAGE LIEN**

John A. Lockett, Jr., Selma, Alabama, Attorney for Catherine M. Moorer
Michael L. Hall, Birmingham, Alabama; John D. Elrod, Birmingham, Alabama,
Attorneys for Citifinancial Corporation

This matter is before the Court on the trial of an adversary proceeding involving Catherine Moorer's complaint to strip off a junior mortgage lien in her chapter 7 bankruptcy case. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has authority to enter a final order. For the reasons indicated below, the Court finds that Catherine Moorer lacks standing to strip off Citifinancial Corporation's second mortgage lien on her home pursuant to 11 U.S.C. §§ 506(a) and 506(d).

FACTS

The debtor, Catherine Moorer, owns a home in Selma, Alabama valued at \$29,900 as of January 2, 2003. Her property is subject to Fairbanks Capital Corporation's ("Fairbanks")

\$34,514.61 first mortgage lien and Citifinancial Corporation's ("Citifinancial") \$18,901.50 second mortgage lien. Moorer filed a chapter 7 bankruptcy case on June 5, 2002 in which Citifinancial filed an \$18,901.50 proof of claim for its second mortgage. Moorer filed a complaint in her chapter 7 case requesting that the Court find Citifinancial's second mortgage lien void under 11 U.S.C. §§ 506(a) and 506(d). She subsequently received a discharge in her no asset case on December 4, 2002.

The Court held a hearing on January 13, 2003 regarding Moorer's complaint. Moorer and Citifinancial disagree regarding the application of the United States Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992) to this case. Moorer argues that because her home is valued at less than Fairbanks' first mortgage lien, Fairbanks is undersecured and Citifinancial is unsecured as against her home. Moorer concedes that under *Dewsnup* she cannot strip down Fairbanks' first mortgage lien to the value of her home but she argues that she can strip off Citifinancial's second mortgage lien in its entirety because her home has no value to which the lien can attach.¹ Citifinancial argues that the *Dewsnup* case applies equally in prohibiting both the strip down and the strip off of mortgage liens in chapter 7 cases.

LAW

In *Dewsnup v. Timm*, the United States Supreme Court refused to allow a chapter 7 debtor to strip down a first mortgage lien against her farmland when the farmland's value was less than the amount of the lien. The question the Court must decide in this case is whether a

¹ The term strip down is used when a mortgage is partially secured and partially unsecured, while the term strip off is used when a junior mortgage is totally unsecured. *In re Fitzmaurice*, 248 B.R. 356, 357 n.2 (Bankr. W.D. Mo. 2000) (citing to *In re McCarron*, 242 B.R. 479, 482 n.3 (Bankr.W.D.Mo.2000)).

chapter 7 debtor in a no asset case may strip off a second mortgage lien against her home when the homestead has no value to which the lien may attach. The Court acknowledges that this is a difficult question to answer due to the confusion that has resulted following the *Dewsnup* decision. Courts have struggled with what lien avoidance rights, if any, debtors may still have after *Dewsnup*. The cases have split. Some courts have allowed strip off; some not. See *In re Fitzmaurice*, 248 B.R. 336,360 (Bankr. W.D. Mo. 2000) (cataloguing strip off cases). This Court concludes that lien stripping by chapter 7 debtors in no asset cases is not allowable because debtors lack standing to avoid such liens.

In her complaint, Moorer seeks to strip off Citifinancial's second mortgage lien pursuant to §§ 506(a) and 506(d) of the Bankruptcy Code. Although Moorer concedes that she cannot strip down Fairbanks' first mortgage lien under *Dewsnup*, she argues she can strip off Citifinancial's second mortgage lien. Like the debtor in *Dewsnup*, Moorer asserts that "under § 506(a), a claim is secured only to the extent of the judicially determined value of the real property on which the lien is fixed;" therefore, she "can void a lien on the property pursuant to §506(d) to the extent the claim is no longer secured and thus is not 'an allowed secured claim.'" *Dewsnup* at 414. Her "construction of § 506 is essentially identical to that of the debtor's in *Dewsnup*, which the Supreme Court expressly rejected." *Cater v. American General Finance (In re Cater)*, 240 B.R. 420, 424 (Bankr. M.D. Ala. 1999) (denying strip off right to a debtor similar to Moorer). The only difference between Moorer's construction of §506 and that of the debtor in *Dewsnup* is that in this case Moorer is seeking to strip off an *unsecured* second mortgage lien rather than strip down an *undersecured* first mortgage lien.

The United States Supreme Court apparently did not question the standing of the debtor

to seek lien avoidance in *Dewsnup* under § 506(d) because the issue was not discussed.² *In re Laskin* at 875 (citing to *In re Dewsnup*, 908 F.2d 588, 589 (10th Cir. 1990)). Therefore, the *Dewsnup* case provides no guidance on this point. Like the *Dewsnup* Court's consideration of the strip down issue, many of the lower courts that have considered the strip off issue have proceeded directly to the heart of the matter. These cases construe § 506 and ponder the meaning of *Dewsnup* in relation to strip off. *In re Fitzmaurice*, 248 B.R. 356, 360 (Bankr. W.D. Mo. 2000) (citing to divided lower court decisions that alternatively permit or prohibit strip off of wholly unsecured junior mortgage liens).

However, some lower court cases do discuss standing and whether the debtor can raise the strip off issue at all. *Id.* at 361-65 (citing to *Laskin v. First National Bank of Keystone (In re Laskin)*, 222 B.R. 872 (B.A.P. 9th Cir. 1998); *In re Virello*, 236 B.R. 199 (Bankr. D.S.C. 1999); *Cunningham v. Homecomings Fin. Network (In re Cunningham)*, 246 B.R. 241 (Bankr. D. Md. 2000)). After review of the law, this Court concludes that resolution of the standing issue must occur first and is determinative. There is no need to consider the underlying legal problem.

Neither § 506(a) nor § 506(d) “explicitly confer an avoiding power on a Chapter 7 debtor.” *Laskin* at 874 (citing to *Oregon v. Lange*, 120 B.R. 132, 134 (B.A.P. 9th Cir. 1990); *Eakin v. Beneficial Idaho, Inc. (In re Eakin)*, 156 B.R. 59 (Bankr. D. Idaho 1993)). Section 506(a) states:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to

² However, the U.S. Supreme Court has stated that it is “obliged to examine standing *sua sponte* where standing has erroneously been assumed below.” *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11U.S.C. § 506(a).

Section 506(d) states:

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--
(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506(d).

Section 506(a) merely bifurcates classes of claims allowed under § 502 into secured and unsecured claims. It does not confer standing on a debtor. Section 506(d) serves the “simple and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed.” *Dewsnup* at 415-16. It does not confer standing on a debtor either. Instead, “[section] 506(d) provides the avoidance consequences of implementing a host of discrete powers conferred in other parts of the Code rather than acting as an avoiding power per se.” *Laskin* at 875 (quoting *Oregon v. Lange*, 120 B.R. 132, 135 (B.A.P. 9th Cir. 1990).

In this adversary proceeding in her chapter 7 case, Moorner simply wishes to keep her home with a lower second mortgage balance on it. Moorner does not seek to redeem an asset under § 722 of the Bankruptcy Code, which authorizes a debtor to utilize § 506. Nor does she cite to any other code section which permits a debtor to seek lien avoidance on abandoned property in a chapter 7 case. This is a no asset chapter 7 case in which the Trustee has abandoned Moorner’s home because it has no equity and therefore no value to the estate. This is not a chapter 11, 12, or 13 case in which valuations are necessary to plan confirmation and

debtors are authorized to seek claim valuation pursuant to §§ 1123 and 1129, § § 1222 and 1225, or §§ 1322 and 1325. Unlike in a chapter 11, 12 or 13 case, “where claims must be allowed or disallowed to determine what gets paid through the plan, and the would-be secured creditor whose claim is allowed only as unsecured gets paid as an unsecured creditor, the allowance of a secured claim, or determination of secured status is meaningless in a Chapter 7 where the trustee is not disposing of the putative collateral.” *Laskin* at 876.

No Bankruptcy Code section authorizes a debtor to seek lien avoidance solely for his or her own benefit. Outside of the case, postdischarge, the house will be foreclosed upon if the mortgage is in default and the foreclosure sale, rather than this Court, will determine the value of the liens.

It is ORDERED and ADJUDGED that Catherine Moorer lacks standing to strip off Citifinancial Corporation’s second mortgage lien on her home pursuant to 11 U.S.C. §§ 506(a) and 506(d) and, therefore, the complaint is DISMISSED with prejudice.

Dated: February 24, 2003


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE