IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In the Matter of:

Randy Dean Tritch,
Debora Jean Tritch, Case No. 10-02695-als7

Debtors Chapter 7

Randy Dean Tritch,
Debora Jean Tritch, Adv. Pro. 10-30097-als

Plaintiffs

v.

BAC Home Loans Servicing LP,
fka Countrywide Home Loans Servicing LP,

Defendant

MEMORANDUM OF DECISION
(date entered on docket: February 11, 2011)

COURSE OF PROCEEDING

Randy D. Tritch and Debora J. Tritch ("Debtors" or "Plaintiffs") filed a voluntary chapter 7 proceeding on May 25, 2010. On July 10, 2010, Debtors filed an adversary proceeding against BAC Home Loans Servicing LP ("BAC" or "Defendant"). The complaint asserts claims based upon 11 U.S.C. section 506(a) and (d) and Bankruptcy Rule 3012 for the purpose of avoiding the mortgage held by BAC. No answer was filed by BAC, and on September 1, 2010, Debtors filed a Motion for Default Judgment ("Motion"). No objections to the Motion were filed and the matter was set for hearing. After a hearing conducted on October 6, 2010, a briefing deadline was established. The matter is now fully submitted.

The court has jurisdiction of these core matters pursuant to 28 U.S.C. sections 157(b)(2) and 1334. For the reasons set forth herein, the Motion for Default Judgment is denied.

FACTS

On Schedule A of Debtors' bankruptcy filing, they list an interest in real property located at 5693 NW 26th Street, Des Moines, IA ("Property"). Debtors claim that their Property is valued at $175,000 and is encumbered by two mortgages: a first mortgage in favor of Chase Home Finance with an outstanding principal balance of $284,585.02, and a second mortgage in favor of BAC with a balance of $32,093.04.

DISCUSSION

Debtors assert that the second mortgage held by BAC should be avoided pursuant to 11 U.S.C. section 506(a) ("Section 506(a)") and 11 U.S.C. section 506(d) ("Section 506(d)") (2010). Section 506(a)(1) states, in relevant part,

> An 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 . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

Plaintiffs argue Defendant's second mortgage on the property is wholly unsecured because the first mortgage exceeds the Property's fair market value. They further argue that Defendant's mortgage is void because Section 506(d) provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." In support of their argument, Plaintiffs cite to several chapter 13 cases which allowed debtors to "strip off" wholly unsecured junior liens. At the time of the hearing, the Court raised *sua sponte* the issue of

whether this was permitted under the Bankruptcy Code in a chapter 7 case, which could result in an inappropriate request for relief under the Motion for Default Judgment.[1]

In contrast to chapter 13, which arguably provides statutory authority for a strip off of an unsecured lien, there is no such authority in statutes applicable in a chapter 7 case. See 11 U.S.C. § 1322(b) (2010); see, e.g., Lane v. W. Interstate Bancorp (In re Lane), 280 F.3d 663 (6th Cir. 2002) (holding holder of unsecured second mortgage could have rights modified by 11 U.S.C. section 1322(b)); Zimmer v. PSB Lending Corp., (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002) (holding that a wholly unsecured lienholder is not protected by the anti-modification clause of 1322(b)). The case at hand was filed under chapter 7.

The United States Supreme Court considered whether chapter 7 debtors may use Section 506(a) and Section 506(d) to strip down a partially secured junior lien in Dewsnup v. Timm. 502 US 410 (1992). The Supreme Court held that in a chapter 7 case a debtor may not attempt to strip down a creditor's lien using 11 U.S.C. section 506(d) when the claim is secured by a lien and has been fully allowed pursuant to 11 U.S.C. section 502. Id. at 417. Courts interpreting this case have reaffirmed the holding. See Harmon v. United States *ex rel.* FMHA, 101 F.3d 574, 580-81 (8th Cir. 1996); Ford Motor Credit Co. v. Lee (In re Lee), 162 B.R. 217, 223-24 (D. Minn. 1993).

There appears to be no question that at the time of the filing, BAC was a secured creditor holding a valid lien against the Plaintiff's homestead as indicated on the schedules filed with the

[1] In a case where the court considered a very similar issue to the one presented here, the creditor did not file an answer, and at the hearing for default judgment, "the bankruptcy court raised *sua sponte* the issue of whether, as a legal matter § 506(d) permits the 'strip off' of an allowed unsecured lien." See Talbert v. City Mortg. Servs. (In re Talbert), 344 F.3d 555, 556 (6th Cir. 2003). The case was appealed to the Sixth Circuit which held that a chapter 7 debtor may not use section 506 to strip off the creditor's junior lien. Id.

Court.[2] The Supreme Court in Dewsnup adopted the creditor's interpretation of Section 506(a) and Section 506(d):

> The words "allowed secured claim" in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a), which by its terms is not a definitional provision. Rather, the words should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured. Because there is no question that the claim at issue here has been "allowed" pursuant to § 502 of the Code and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d), which voids only liens corresponding to claims that have *not* been allowed and secured.

Dewsnup, 502 U.S. at 415. Applying this interpretation, the Debtors have not established that the second mortgage of BAC is properly avoided under Section 506(d) as requested in the Motion for Default Judgment.

Some courts distinguish between a "strip off" of a lien and a "strip down" of a lien. A "strip off" removes the entire lien if the lien is completely unsecured, while a "strip down" removes only the unsecured portion of a partially secured lien. See 4-506 Collier on Bankruptcy ¶ 506.06 (2010). Plaintiffs argue that Dewsnup does not apply to the case at hand because Dewsnup considered a partially secured mortgage, or a strip down, and the mortgage here is completely unsecured. The Court is not persuaded by this argument.

Post-Dewsnup, most courts, including the Fourth and Sixth Circuits and the Bankruptcy Appellate Panel for the Ninth Circuit, have extended Dewsnup's holding to both strip downs and strip offs in chapter 7 cases. See Talbert v. City Mortg. Servs. (In re Talbert), 344 F.3d 555, 562 (6th Cir. 2003); Ryan v. Homecomings Fin. Network, 253 F.3d 778, 782 (4th Cir. 2001); In re Laskin, 222 B.R. 872, 876 (B.A.P. 9th Cir. 1998). These courts use the reasoning from Dewsnup

[2] Schedule D requires that Debtors: "[s]tate the name, mailing address, including zip code, and last four digits of any account number of all entities holding claims secured by property of the debtor as of the date of filing of the petition."

quoted above, that Section 506(d)'s definition of "allowed secured claim" applies to both unsecured junior liens and under-secured liens. "[E]ven a claim based on a wholly-unsecured junior lien is an 'allowed secured claim' because under Dewsnup the term 'allowed secured claim' simply means a claim that is allowed under § 502 and 'secured' in the sense that a lien secures the collateral." In re Hoffman, 433 B.R. 437, 440 (Bankr. M.D. Fla. 2010) (citing Talbert, 344 F.3d at 562; Ryan, 253 F.3d at 783; Laskin, 222 B.R. at 876).

Although the Eighth Circuit has not yet ruled on this issue, in Harmon v. United States *ex rel.* FMHA, the Eighth Circuit explained Dewsnup as holding that Section 506 provides no power to strip down a lien:

> [I]f a claim is secured in the non-bankruptcy sense, without regard to § 506(a)'s bifurcation of claims into secured and unsecured claims, and it is allowed in the bankruptcy case, it cannot be voided or stripped down by § 506(d).
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> . . . .
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> The problem with the government's argument is that Dewsnup does not hold that § 506(d) *prohibits* lien-stripping in Chapter 7-it holds only that § 506(d) does not itself provide the authority for a debtor to strip down liens. The lien in Dewsnup remained on the property not because § 506(d) mandated that result, but because neither § 506(d) nor any other provision of the Code applicable in Chapter 7 gave the debtor the power to strip down the lien.

101 F.3d 574, 580-81 (8th Cir. 1996) (internal citations omitted).

The Western District of Missouri extended the Eighth Circuit's holding in Harmon to an attempt to strip off a lien. The court stated, "this Court believes that the Eighth Circuit's comments in Harmon tip the scale in favor of adopting the position that a Chapter 7 debtor cannot utilize 11 U.S.C. § 506(d) to 'strip off' a completely unsecured junior lien from real estate." In re Fitzmaurice, 248 B.R. 356, 361 (Bankr. W.D. Mo. 2000);

The cases relied upon by the Debtor support the minority view, which in many instances have been questioned or overturned.[3] This Court agrees with the majority view, which includes Dewsnup, and post-Dewsnup rulings, which hold that a chapter 7 debtor may not strip off a wholly unsecured lien.

IT IS THEREFORE ORDERED that the Motion for Default Judgment is denied and the case is dismissed.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Adversary Proceeding
Others: BAC Home Loans Servicing LP, Defendant

[3] In In re Lavelle, the Eastern District of New York allowed a chapter 7 debtor to strip-off a lien even after the holding in Dewsnup. No. 09-72389-478, slip Op., 2009 WL 4043089 (Bankr. E.D.N.Y. Nov. 25, 2009). The holding in Lavelle has subsequently been disagreed with two times in the Eastern District of New York. See In re Pomilio, No. 809-76399-reg, 2010 WL 681300 (Bankr. E.D. N.Y. Feb. 23, 2010), In re Caliguri, No. 09-75657-ast, 2010 WL 1027411 (Bankr. E.D. N.Y. Mar. 17, 2010). A court in the Northern District of Illinois also recently declined to follow the Lavelle case. See In re Immel, No. 09 B 36874, slip op., 2010 WL 2640104 at *6 (Bankr. N.D. Ill. June 30, 2010) ("[T]his court is convinced that the rationale of Dewsnup applies to strip-off requests by chapter 7 debtors with 'equal force and logic'"). In In re Yi, the Eastern District of Virginia allowed a strip off of an unsecured lien. This case, however, was expressly overruled by the Fourth Circuit in Ryan, 253 F.3d at 782 (holding that a Chapter 7 debtor may not use section 506(d) to strip off an allowed, wholly unsecured consensual junior lien from real property); see also Warthen v. Smith (In re Smith), 247 B.R. 191 (W.D. Va. 2000) (overruled by Ryan). Similarly, in In re Zempel the Western District of Kentucky held that a chapter 7 debtor could avoid a wholly unsecured junior lien on property under section 506(d). 244 B.R. 625, 628 (Bankr. W.D. Ky. 1999). This case was overruled by the Sixth Circuit's decision in Talbert. 344 F.3d at 556 (holding that a chapter 7 debtor may not use Section 506 to strip off the creditor's junior lien); see also In re Farha, 246 B.R. 547 (Bankr. E.D. Mich. 2000) (overruled by Talbert).