

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERRY R. TALBERT
and
LAHNA L. TALBERT,

Appellants,

v.

CITY MORTGAGE SERVICES,

Appellee.

Hon. Richard Alan Enslen

Case No. 1:01-CV-795

JUDGMENT

In accordance with the Opinion of this date,

IT IS HEREBY ORDERED that the Judgment of the Bankruptcy Court is
AFFIRMED.

DATED in Kalamazoo, MI:
June 6, 2002

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
United States District Judge

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OPINION

This bankruptcy appeal presents a legal issue pertaining to whether debtors can avoid a valueless lien pursuant to 11 U.S.C. § 506(d). Oral argument on the appeal is unnecessary in light of the briefing and the issues presented. See Bankr. Rule 8012(3). The Court will affirm the Judgment of the Bankruptcy Court.

I. Standard of Review

The Bankruptcy Court's conclusion that an unsecured, valueless lien is not voidable by the debtor under 11 U.S.C. § 506(d) is a conclusion of law. Legal conclusions of the Bankruptcy Court are reviewed *de novo*. *In re Rembert*, 141 F.3d 277, 280 (6th Cir. 1998).

II. Facts

Debtors Terry and Lahna Lambert ("Appellants") filed an adversary proceeding against Appellee City Mortgage Services ("City Mortgage") to avoid its lien on Appellants' home pursuant to 11 U.S.C. § 506(d). City Mortgage did not file an answer or other response, so the Bankruptcy Court scheduled a hearing for entry of default judgment. At the hearing, the Bankruptcy Court *sua*

sponte raised the issue of whether § 506(d) allows the avoidance of a valueless lien. After briefing by Appellants, the Bankruptcy Court issued a written Opinion and Order concluding that § 506(d) does not allow the avoidance of a valueless lien and dismissing Appellants' adversary proceeding with prejudice. Appellants appeal this Order.

The Bankruptcy Court accepted as true the factual allegations of the Adversary Complaint because City Mortgage defaulted. This Court also accepts those allegations as true because of the default and because City Mortgage has not responded to Appellants in this Court. At the time of Appellants' bankruptcy filing, they owned their residence at 4202 Arlene Dr., Lansing, Michigan. The residence was encumbered by a first mortgage held by Home Comings Financial in the amount of \$90,633. City Mortgage held an inferior mortgage, approximately in the amount of \$33,110. The fair market value of the home at the time of filing was \$88,000, and therefore, City Mortgage held a "valueless" lien.

III. Analysis

Section 506(d) reads:

(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). Whether this section permits the avoidance, or "stripping down," as it is called, of an undersecured lien was taken up by the United States Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410 (1992). The lien in *Dewsnup* was partially secured by the value of the property, but the value of the property was too low to completely cover the lien. *Id.* at 412.

The Supreme Court held that a debtor could not avoid the unsecured portion of an undersecured lien under § 506(d) because the lender's claim has been "secured by a lien and has been fully allowed pursuant § 502." *Dewsnup*, 502 U.S. at 417. Therefore, it is an "allowed secured claim" and excepted from § 506(d), even though this does not comport with the definition of "allowed secured claim" as found in § 506(a). *See id.* "[G]iven the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy against allowed claims *to the extent that they become 'unsecured'* for purposes of § 506(a) without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles." *Id.* at 420 (emphasis added). However, the Supreme Court also limited *Dewsnup* to its facts, creating the current controversy. *See id.* at 416-17.

The instant case presents the slightly different situation of a completely unsecured lien, where none of the lien at issue is covered by value in the property by virtue of a superior mortgage, thus making the lien valueless. As Plaintiffs noted in their brief, some courts who have faced the question now before this Court have concluded that an unsecured lien cannot be avoided, or "stripped off," in this situation because § 506(d) applies only when the claims allowance process is involved. *See Ryan v. Homecomings Financial Network*, 253 F.3d 778 (4th Cir. 2001); *In re Laskin*, 222 B.R. 872 (B.A.P. 9th Cir. 1998); *In re Bessette*, 269 B.R. 644 (Bankr. E.D. Mich. 2001); *In re Davenport*, 266 B.R. 787 (Bankr. W.D. Ky. 2001); *In re Cunningham*, 246 B.R. 241 (Bankr. D. Md. 2000); *In re Virello*, 236 B.R. 199 (Bankr. D. S.C. 1999). Some courts have concluded that the language of *Dewsnup* compels the same result whether the lien sought to be avoided is undersecured or unsecured, and thus, an unsecured cannot be avoided under § 506(d). *See In re Keltz*, 261 B.R. 845 (Bankr. W.D. Pa. 2001); *In re Cater*, 240 B.R. 420 (M.D. Ala. 1999).

This latter camp is the one in which this Court falls after carefully considering all of the arguments presented to it. Plaintiffs have valid arguments, but this Court feels bound to follow what it feels is the inevitable result of the *Dewsnup* holding. This is true even though the *Dewsnup* Court limited its holding to the facts of that case.¹

An unsecured lien operates in the same manner as the undersecured lien in *Dewsnup*, in that the lender's claim is secured by a lien, even if without sufficient recourse to value in the property. See *Dewsnup*, 502 U.S. at 417. The *Dewsnup* Court said § 506(d) did not give debtors an avoidance remedy "to the extent that [claims] become 'unsecured' for purposes of § 506(a)." *Id.* at 520. The Court is unconvinced by the cases cited by Plaintiff which argue that *Dewsnup* is inapplicable simply because *Dewsnup* purports to be inapplicable to any other facts or because of the undersecured/unsecured distinction.² All that has changed in the instant case is the extent to which the claim has become unsecured, so under the Supreme Court's reading of the statute, Plaintiffs cannot avoid the lien at issue.

¹ The Bankruptcy Court produced a well-reasoned opinion centering on the claims allowance analysis and holding that Plaintiffs are not entitled to the relief they seek. This Court did not find it necessary to consider this basis for its opinion since it found the statutory interpretation in *Dewsnup* to be applicable to the instant case.

² Among Plaintiff's cited cases, two distinguished *Dewsnup* on a basis besides the undersecured/unsecured distinction, but with facts not present in the instant case. In those cases, the lien came from a judgment creditor, not a creditor with whom the debtor had a contractual relationship. See *In re Smith*, 247 B.R. 191, 195 (W.D. Va. 2000); *In re Howard*, 184 B.R. 644, 646 (Bankr. E.D.N.Y. 1995).

IV. Conclusion__

For the reasons stated, the Judgment of the Bankruptcy Court will be affirmed. A Judgment consistent with this Opinion will be entered.

DATED in Kalamazoo, MI:
June 6, 2002

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
United States District Judge