

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

IN RE: ) Chapter 7  
 )  
PISTRITTO, Fabio and Cynthia, ) Case No. 03-10245  
 )  
Debtors. )

**OPINION**<sup>1</sup>

Before the Court is the Debtors' Motion to avoid the lien of Household Finance Corporation (HFC). For the reasons stated below, we deny this Motion.

I. FACTUAL BACKGROUND

On January 21, 2003, Fabio and Cynthia Pistritto ("the Debtors") filed a joint petition for relief under chapter 7. The Debtors own residential property located at 40 East Bellamy Drive, New Castle, Delaware ("the Property"). The appraised value of the Property is \$123,000.00. The Debtors have two mortgages on their property: a first mortgage held by First Horizon Home Loan in the amount of \$119,627.07 and a second mortgage held by Community Home Finance in the amount of \$14,640.67. Additionally, the Debtors had granted a lien on the Property to HFC, third in priority to the others, for a line of credit, which totals \$10,365.59.

On May 5, 2003, the Debtors filed a Motion to avoid the lien

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<sup>1</sup> This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

of HFC under section 506(d) of the Bankruptcy Code. No objection was filed to the motion and the Debtors filed a certificate to that effect. This matter is ripe for decision.

## II. JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(2)(B), (K) & (O).

## III. DISCUSSION

The Debtors argue that, because there is no value remaining in the home to which the lien can attach, HFC's claim is wholly unsecured. Therefore, the Debtors assert that, HFC's lien can be avoided or "stripped off" under section 506(d) and treated as an unsecured claim.

We are cognizant, however, of the Supreme Court's decision in Dewsnup v. Timm which held that an under-secured lien could not be avoided by the Debtor under section 506(d). 502 U.S. 410 (1992). In Dewsnup, the Supreme Court stated

Were we writing on a clean slate, we might be inclined to agree . . . that the words 'allowed secured claim' must take the same meaning in § 506(d) as in § 506(a). But . . . we are not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected.

502 U.S. at 417. The Court further concluded that Congress did not intend to alter or create a new right against allowed secured claims when their collateral loses value. Id. at 419.

The issue in this case is whether Dewsnup should be limited to under-secured liens and not extended to wholly unsecured liens. The courts refer to the avoidance of under-secured liens as "stripping down" the lien and the avoidance of wholly unsecured liens as "stripping off" the lien. See, e.g., Yi v. Citibank, N.A. (In re Yi), 219 B.R. 394, 397 n.6 (E.D. Va. 1998).

All the Courts of Appeal to address this issue hold that a chapter 7 debtor may not strip off a wholly unsecured lien. See, e.g., Talbert v. City Mortgage Servs. (In re Talbert), 344 F.3d 555, 561-62 (6th Cir. 2003); Ryan v. Homecomings Fin. Network, 253 F.3d 778, 782 (4th Cir. 2001). Both Ryan and Talbert conclude that Dewsnup's rationale which prohibits stripping down a lien applies equally to stripping off a lien. Talbert, 344 F.3d at 560; Ryan, 253 F.3d at 782. Talbert summarized the Dewsnup rationale as follows:

- (1) any increase in the value of the property from the date of the judicially determined valuation to the time of the foreclosure sale should accrue to the creditor;
- (2) the mortgagor and mortgagee bargained that a consensual lien would remain with the property until foreclosure; and
- (3) liens on real property survive bankruptcy unaffected.

344 F.3d at 559. As the Ryan Court stated, there is "no principled distinction to be made between" stripping down and stripping off a lien. 253 F.3d at 782.

The Third Circuit has not taken a position on the issue presented in this case. McDonald v. Master Fin., Inc. (In re

McDonald), 205 F.3d 606, 614-15 (3d Cir. 2000) ("Courts are split on whether Dewsnup's rejection of lien-stripping in Chapter 7 applies to a wholly unsecured lien, although of course we express no view on that dispute."). However, the courts in this Circuit generally conclude that a debtor may not strip off a lien in a chapter 7 case under section 506(d). See, e.g., Boring v. Promistar Bank, 312 B.R. 789, 796-97 (W.D. Pa. 2004) (holding that section 506(d) as interpreted by Dewsnup did not allow stripping off non-consensual lien); Bowman v. Ocwen Fed. Bank (In re Bowman), 304 B.R. 166, 169 (Bankr. M.D. Pa. 2003) (holding that section 506(d) does not allow consensual lien to be stripped off); Keltz v. HomeEq (In re Keltz), 261 B.R. 845, 846 (Bankr. W.D. Pa. 2001) (same); Swiatek v. Pagliaro (In re Swiatek), 231 B.R. 26, 29-30 (Bankr. D. Del. 1999) (concluding that a non-consensual lien on collateral without value could not be stripped off under section 506(d)).

The Debtors cite several cases, however, which they assert support their position. See, e.g., McDonald, 205 F.3d 606; Yi, 219 B.R. 394; In re Abruzzo, 245 B.R. 201, 203 (Bankr. E.D. Pa. 1999) rev'd In re Abruzzo, 2000 WL 420635 (E.D. Pa. Apr. 10, 2000).

The Court in Yi held that stripping off a lien is a different action from stripping down a lien. Yi, 219 B.R. at 396. Consequently, the Court held that a lien on collateral

fully pledged to another is unsecured and may be entirely avoided. Id. at 397, 401. Accord Warthen v. Smith (In re Smith), 247 B.R. 191, 195 (W.D. Va. 2000); Zempel v. Household Fin. Corp. (In re Zempel), 244 B.R. 625, 629-30 (Bankr. W.D. Ky. 1999); Howard v. National Westminster Bank, U.S.A. (In re Howard), 184 B.R. 644, 647 (Bankr. E.D.N.Y. 1995).

However, the Yi decision has been effectively overruled by the Fourth Circuit's decision in Ryan. Talbert, 344 F.3d at 558. The Yi holding has been criticized by other courts, as well. See Laskin v. First Nat'l Bank of Keystone, 222 B.R. 872, 876 (B.A.P. 9th Cir. 1998) ("Neither the Courts in Yi or [sic] Howard propound any rationale for distinguishing [the cases from Dewsnup]."). See also, American Gen. Fin., Inc. v. Dickerson (In re Dickerson), 222 F.3d 924, 926 (11th Cir. 2000) (disagreeing with courts which allow strip off because they overemphasize the imprecise science of valuation).

The other cases cited by the Debtors to support their request are similarly unpersuasive. As noted above, the Court in McDonald refused to address the precise issue before us. 205 F.3d at 614-15. Instead, the McDonald Court addressed the effect of section 1322(b)(2) on a secured claim in a chapter 13 case. 205 F.3d at 609. That ruling is not applicable to this case. See, e.g., Laskin, 222 B.R. at 876 (chapter 13 lien stripping is based on different section of the Code).

Nor is Abruzzo relevant to the issue before us. In Abruzzo, the lien was stripped while the case was in chapter 13, not in chapter 7. 245 B.R. at 203. Additionally, the creditor whose lien was to be stripped was under-secured, not wholly unsecured. Id. at 211. On appeal, the District Court stated that it was remanding to the Bankruptcy Court the determination of whether section 506(d) applied. 2000 WL 420635 at \*6.

In sum, the Debtors ask us to follow a line of cases which unpersuasively distinguish stripping off a wholly unsecured lien from stripping down a partially unsecured lien. We agree with Ryan and Talbert: there is no principled method available to distinguish stripping off from stripping down. Talbert, 344 F.3d at 561; Ryan, 253 F.3d at 782. We, therefore, conclude that the Supreme Court's ruling in Dewnsup prevents a debtor from taking either action. 502 U.S. at 419.

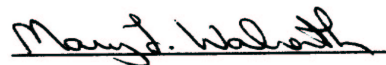
#### IV. CONCLUSION

For the reasons stated above, we will deny the Debtors' Motion to avoid the lien of HFC.

An appropriate order is attached.

Dated: April 19, 2005

By the Court:



Honorable Mary F. Walrath  
U.S. Bankruptcy Judge

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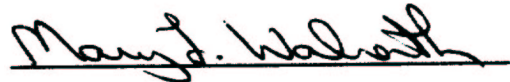
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**ORDER**

AND NOW this **19th** day of **APRIL, 2005**, upon consideration of the Motion of the Debtors to Avoid the Lien of Household Finance Corporation, it is hereby

**ORDERED** that the Debtors' Motion is **DENIED**.

BY THE COURT:



Mary F. Walrath  
United States Bankruptcy Judge

cc: Regina Gray, Esquire<sup>1</sup>

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<sup>1</sup> Counsel shall serve a copy of this Opinion and Order on all interested parties and file a Certificate of Service to that effect.