UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 00-21836

BRIAN J. GOFF and
LISA J. GOFF

Debtors. **DECISION & ORDER**

BACKGROUND

On June 23, 2000, Brian J. Goff and Lisa J. Goff (the "Debtors") filed a petition initiating a Chapter 7 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtors indicated that: (1) they were the fee owners of a single family residence at 2495 Andrews Road, Canandaigua, New York ("Andrews Road"); (2) Andrews Road had a current market value of $64,000.00; (3) Fleet Mortgage Group, Inc. ("Fleet") held a first mortgage on Andrews Road with a current balance of $64,786.30 (the "Fleet Mortgage"); (4) The Money Store held a second mortgage on Andrews Road with a current balance of $16,534.31 (the "Money Store Mortgage"); and (5) they had unsecured indebtedness in excess of $119,000.00, approximately $65,000.00 of which was a student loan.

On August 2, 2000, the Debtors filed a motion (the "Strip Off Motion") to have the Court declare the Money Store Mortgage unsecured.[1] The Motion asserted that: (1) the Debtors had valued Andrews Road at $64,000.00, in accordance with a May 5, 2000 appraisal prepared by David G.

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[1] Although The Money Store failed to interpose a response to the Strip Off Motion, the Court always reserves the right to deny a motion, even if there has been a default, should it find that the relief requested is unavailable or inappropriate.

Krause, a New York State licensed real estate broker; (2) on the date of the filing of their bankruptcy petition, the outstanding principal balance due on the Fleet Mortgage was $64,786.30; (3) the amount due on the Fleet Mortgage exceeded the appraised fair market value of Andrews Road, so that the claim of The Money Store for the amount due on the Money Store Mortgage was an unsecured claim, in accordance with Section 506(a)[2]; and (4) since the claim of The Money Store was wholly unsecured, the Court should declare the lien of the Money Store Mortgage to be void, in accordance with Section 506(d).[3]

The Strip Off Motion further alleged that: (1) the Money Store Mortgage was not a purchase money mortgage, but was a consolidation loan used by the Debtors to pay off consumer debt; (2) the Federal Courts were divided as to whether such a wholly unsecured junior mortgage was entitled to

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[2] Section 506(a) provides that:

> (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 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.

11 U.S.C. § 506(a) (2000).

[3] Section 506(d) provides that:

> (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 -
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> (1) such claim was disallowed only under Section 502(b)(5) or 502(e) of this title; or
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> (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) (2000).

the protection of the antimodification provisions of Section 1322(b)(2) in a Chapter 13 case; (3) in Chapter 7 cases, the Federal Courts were also divided as to whether a debtor could strip off a wholly unsecured junior mortgage lien by resorting to a Section 506 analysis; and (4) the Court should follow the reasoning and decisions of those courts which have permitted a Chapter 7 debtor to strip off a wholly unsecured junior mortgage lien, such as that of the Court in *Farha & Khala v. First American Title Insurance*, 246 B.R. 547 (Bankr. E.D. Mich. 2000).

DISCUSSION

After reviewing the Strip Off Motion[4] and the Decisions on each side of the debate, I am persuaded by those courts that have prohibited a Chapter 7 debtor from stripping off a wholly unsecured junior mortgage lien. In his decision in *In re Fitzmaurice*, 248 B.R. 356 (Bankr. W.D. Mo. 2000) ("*Fitzmaurice*"), Chief Judge Frank W. Koger set forth an extensive analysis of the issue and a comprehensive review of the reasoning set forth by a number of other courts, which, as he did, prohibited such a strip off. I concur in the analysis set forth in *Fitzmaurice* and many of the findings set forth in the cases cited and summarized therein, including that: (1) to allow the strip off of such a junior mortgage lien by the use of Section 506 is inappropriate in view of the Decision of the United States Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410 (1992); (2) a Chapter 7 debtor has no standing under Section 506(d) to strip off a wholly unsecured junior mortgage lien; (3) in the absence of a claims allowance process, there is no basis to avoid a lien under Section 506(d); (4)

[4] The attorney for the Debtors made an excellent presentation of the various arguments for permitting a strip off.

Section 506 was intended to facilitate the valuation and disposition of property in a reorganization proceeding, not to confer an additional avoiding power on a Chapter 7 debtor; and (5) to allow such a strip off would be an exercise of judicial legislation.

I find that a Chapter 7 debtor cannot strip off a wholly unsecured junior mortgage lien through the use of Section 506.

CONCLUSION

The Strip Off Motion is in all respects denied.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: October 4, 2000