

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ELIZABETH HOLL

Case No. 03-13361 K

Debtor

This is a Chapter 13 case in which M & T Bank is a creditor by virtue of a judgment obtained on a personal guaranty. It has a judgment lien on the Debtor's residence, which is a mixed-use building in the village of Orchard Park. That residence contains office space, retail space and an apartment.

There is no mortgage on the property, but there are prior non-avoidable liens of \$42,300, plus a \$10,000 homestead exemption.

The M & T judgment lien totaled \$134,891 as of June 26, 2003, when the Bank filed its Proof of Claim. Whatever the non-exempt equity is up to that amount is a secured claim under 11 U.S.C. § 506(a) and 11 U.S.C. § 1322(b)(2), which the Debtor must pay in full (together with a "present-value factor") under her Plan.

The value of the building is disputed. The Court heard the testimony of two appraisers on September 29, 2003.

The parties requested several weeks to try to settle the dispute. That effort failed, and the Court must now rule.

The Debtor's appraisal yielded a result of \$163,000 without deduction of \$30,000 for asbestos abatement - - in other words, the appraisal was for \$133,000. However, that appraisal is 3 ½ years old. The Bank's appraisal yielded a result of \$220,000 after allowance for asbestos abatement. That appraisal is dated July 2, 2003.

There is some dispute about the "comparables" selected by each appraiser - - the Debtor's appraiser having found a value of \$163,000 under the "Sales Comparison Approach," and the Bank's appraiser having found a value of \$260,000 under that approach.

There also is a substantial difference in the Capitalization Rate used for the "Income Capitalization Approach." However, the Debtor's appraiser readily conceded that the 15% rate he used 3 ½ years ago is too high for today, mortgage rates having dropped so much during the period. He said he would use 8% today. (The Bank's appraiser used 9.25% overall.)

He also agreed that the "comps" would be "on the low side" today.

He testified that he believed that the property is worth \$185,000 - \$200,000 today, less the \$30,000 asbestos-abatement cost.

Though the Court has no doubt that that opinion is indeed an "expert opinion," it is not an "appraised value." It is an expert's view as to how he would view the 3-year old information he collected in 2000, given general market changes since then. If that were the only evidence of value the Court had, it might suffice for some purposes.

But it is not the only evidence the Court has, nor is it the best. The Bank's appraisal is in evidence. The Debtor challenges the Bank's appraisal in several regards, but offers no better evidence. The Debtor contests the Bank's appraiser's choice of "comps" but offers no better ones during the relevant time period; say, the last year or two. The Debtor challenges some of the Bank's appraiser's presumptions - - e.g. about parking, about the worthiness of the tax assessment value, about the future of mortgage rates, about the use of square foot adjustments from the "comps" for this property instead of "whole-to-whole" adjustments, - - but provides nothing about what value would be yielded if the Debtor's presumptions were to be applied to the property today in a complete, coherent appraisal based on the Debtor's presumptions.

The value of appraisals of such mixed-use properties is such that although an appraiser may venture a good guess as to how to extrapolate from an old appraisal, the weight of that evidence as against a competently performed current appraisal is nil. Unlike a single family home in an established neighborhood or tract, there is no "straight line" method of adjusting from an old appraisal. The character of the village and its politics, the tenant mix, and the comps, have all changed. The "uniqueness" of such real estate, as compared to tract homes defies such rules of thumb as "The value of homes in WNY has stayed flat for 'X' years, or has risen 59% per year."

There is no way for the Court to use the Debtor's appraisal as evidence of current value. Therefore, all the Court has is the Bank's appraisal, and the challenges to it.

The Court finds that the Bank's appraisal is competent and persuasive in all

regards, and finds the value of the property, for purposes of the Debtor's Chapter 13 Plan, to be \$220,000 (after allowing \$30,000 for asbestos abatement).¹

SO ORDERED.

Dated: Buffalo, New York
November 7, 2003

/s/ Michael J. Kaplan

U.S.B.J.

¹The Court categorically rejects the Debtor's suggestion that costs of liquidation should be taken into account to reduce the value of the property. While that must be done is measuring the "Chapter 7 test" vis a vis non-exempt equity in the property (see *In re Dixon*, 140 B.R. 945 (Bankr W.D.N.Y. 1992)), it is not done in deciding the fair market value of property that a debtor plans to keep. (See *In re Freudenheim*, 189 B.R. 279 (Bankr. W.D.N.Y. 1995); *Associates Commercial Corp. v. Rash (In re Rash)*, 519 U.S. 1086 (1997).