

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable A. Bruce Campbell**

In re:)	
)	
JIM EDWARD SMITH, JR.)	Case No. 03-12182 EEB
SSN. XXX-XX-1856)	Chapter 13
PEGGY SUE SMITH)	
SSN. XXX-XX-7029)	
)	
Debtors.)	
)	
JIM EDWARD SMITH, JR. and)	Adversary No. 03-1390 ABC
PEGGY SUE SMITH,)	
)	
Plaintiffs,)	
v.)	
)	
BENEFICIAL MORTGAGE OF)	
COLORADO,)	
)	
Defendant.)	
)	
_____)	

ORDER DISMISSING ADVERSARY CASE

This matter is before the Court on the Debtors' Complaint seeking to value the Defendant's consensual lien secured solely by their residence at zero. Debtors seek that determination in connection with their effort to modify the rights of the Defendant in their Chapter 13 plan, contrary to the antimodification exception written into 11 U.S.C. § 1322(b)(2). They also assert they are entitled to relief pursuant to 11 U.S.C. § 506(a) and § 522(f).

The Court issued an Order to Show Cause to the Debtors as to why this adversary proceeding ought not be dismissed, in part, because section 522(f) may not be invoked to avoid a consensual lien. The Debtors responded to the Order arguing that there is authority from other circuits which would authorize such a strip down.¹ That authority they cite does not respond to this Court's query of the Debtors as to the application of section 522(f) to avoid a consensual lien. Thus, the Court concludes that section 522(f) is unavailable to the Debtors to avoid Defendant's lien.

¹Debtors do not recite that authority in the response to the Order to Show Cause. They merely refer the Court to the authority they recited in their Complaint, *Zimmer v. PBS Lending*, 313 F.3d 1220 (9th Cir. 2002).

Debtors also rely on section 506(a) and section 1322(b)(2) as the basis for their claim that they may modify the rights of the Defendant pursuant to their Chapter 13 plan. A review of section 506(a) of the Code leads to the conclusion that the Debtors must pursue such relief, not in the context of an adversary case, but in connection with the motion to confirm their Chapter 13 plan.

11 U.S.C. §506(a) provides that “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 an unsecured claim to the extent that the value of such creditor’s interest . . . is less than the amount of such allowed claim. ***Such value shall be determined in light of the purpose of the valuation . . . and in conjunction with any hearing . . . on a plan affecting such creditor’s interest.***” Accordingly, it is

ORDERED that the Debtors’ Complaint is DISMISSED without prejudice to the right of the Debtors to pursue the relief they request in the context of the Motion to Confirm their Chapter 13 plan.²

DATED:

BY THE COURT:

A. Bruce Campbell
United States Bankruptcy Judge

²The Court notes that the Local Rules of this Court recognize the mandate of section 506(a) and endeavor to insure that the creditor whose lien is to be valued is afforded due process. Specifically, L.B.R. 320(c)(1) incorporates and makes applicable F.R.Bank.P. 9014 and 7004 to hearings on motions to confirm Chapter 13 plans. L.B.R. 320(c)(2) requires the debtor to use L.B.Form 320.4 which contains the following:

THE DEBTOR MOVES FOR ORDERS AS FOLLOWS:

(2) For an order pursuant to 11 U.S.C. § 506(a) valuing secured claims which are to be paid through the plan at the amount payable as specified in the plan for each such creditor. . . .

(3) For an order pursuant to § 1325(a)(5) determining that the property to be distributed under the plan to holders of secured claims is not less than the allowed amount of each such claim.

CREDITORS SHALL TAKE NOTICE THAT IN THE ABSENCE OF A WRITTEN OBJECTION BY A CREDITOR, THE AMOUNT PAYABLE WHICH IS SPECIFIED IN THE PLAN TO BE PAID TO EACH OF THE SECURED CREDITORS WILL BE ACCEPTED BY THE COURT AND SHALL BE USED IN THE COURT’S DETERMINATION THAT THE PLAN COMPLIES WITH §1325(a)(5).

The Local Rules of this Court require the debtor to verify the motion and that the motion contain “facts sufficient to enable the court to make the appropriate findings in accordance with the requirements of Chapter 13.” See L.B.R. 320(c)(3).