

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
PATRICK T. O'NEILL and) CASE NO. 10-25286 JPK
PENNY E. O'NEILL,) Chapter 13
Debtors.)

PATRICK T. O'NEILL and)
PENNY E. O'NEILL,)
Plaintiffs,)
v.) ADVERSARY NO. 11-2030
WELLS FARGO BANK, N.A.,)
Defendant.)

MEMORANDUM OF DECISION

In this adversary proceeding, the plaintiffs Patrick T. O'Neill and Penny E. O'Neill ("O'Neills") seek a determination that the security interest¹, in this case a mortgage, of Wells Fargo Bank, N.A. ("Wells Fargo") in real property located at 205 East 11th Street, Hobart, Indiana does not constitute an allowed secured claim under the definition provided by 11 U.S.C. § 506(a) and is therefore not within the provisions of 11 U.S.C. § 1322(b)(2). The O'Neills assert that secured claims in the subject real property having priority over the mortgage interest of Wells Fargo exceed the fair market value of the property, thereby leaving no equity in the property to which the security interest of Wells Fargo attaches, and thus allowing the debtors' Chapter 13 plan to treat the lien as valueless and provide solely for Wells Fargo as a general unsecured claimant. As might be expected, Wells Fargo asserts that there is equity for at least a portion of the indebtedness secured by its mortgage, and that therefore the provisions of 11 U.S.C. § 1322(a)(2) apply to treatment of its security interest under the debtors' Chapter 13 plan.

¹ "Security interest" is defined by 11 U.S.C. § 101(51).

The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and N.D.Ind.L.R. 200.1. Because this adversary proceeding seeks to determine the extent of the security interest of Wells Fargo in relation to the value of the property, this action is a core proceeding under 28 U.S.C. § 157(b)(2)(K). Because this action seeks a determination with respect to the allowance of the claim of Wells Fargo as a secured claim, this adversary proceeding may also be deemed to be a core proceeding under 28 U.S.C. § 157(b)(2)(B) and 28 U.S.C. § 157(b)(2)(O). Additionally, the parties have stipulated to the court's exercise of final judgment authority in this case.

The record applicable to determination of this adversary proceeding was established at a trial held on July 13, 2011. At that proceeding, counsel for both parties stipulated that the determination sought from the court is "all or nothing". If there is no equity in the subject property for Wells Fargo's mortgage interest, then it is completely strippable and Wells Fargo may be dealt with as an unsecured claimant in the debtors' plan; if there is one dollar of equity for the mortgage, then the entire claim of Wells Fargo must be treated as a secured claim and appropriately provided for by the debtors' plan. As stated by the court in *In re Stewart*, 408 B.R. 215, 218-219 (Bankr. N.D.Ind. 2009):

We next turn to substantive matters relating to the adversary proceeding. Adversary proceeding numbers 08-2109 and 08-2110 concern implementation of a provision of the debtor's confirmed plan which provides for avoidance of mortgage interests of both JPMorgan Chase Bank, as Trustee, and of HSBC Mortgage Services, Inc. (collectively, "the principal defendants") with respect to the debtor's residential real estate. The plan was premised upon the contention that secured claims having priority over those of the two designated defendants exceeded the value of the residential real estate, and thus that the mortgage interests of the two designated defendants were totally "strippable" under 11 U.S.C. § 1325(a)(5) because those interests did not constitute a "secured claim" within the provisions of 11 U.S.C. § 1322(b)(2). There are divided lines of authority throughout federal courts of the United States on the issue of whether or not a security interest secured only by an interest in real property that is the debtor's principal residence can be

“stripped” completely in a circumstance in which secured claims of creditors having priority over those of the subject mortgagee exceed the value of the subject real estate, thereby leaving no “equity” to which the interests of the target mortgagee may attach. The court expresses no opinion whatsoever on whether or not any particular line of authority with respect to this issue will be adopted by this court in a contested case. The complaint definitely states a potentially sustainable claim with respect to this issue.

As a result of the parties’ stipulation, the court will apply the majority view on the issues presented in this adversary proceeding, as the concepts were well-stated in *In re Witte*, 2011

WL 1134683 (Bankr. S.D.Ind. 2011):

A chapter 13 plan may “modify” the rights of holders of secured claims under 11 U.S.C. § 1322(b)(2), but the plan cannot be confirmed unless it provides that the amount to be distributed to the secured creditor is not less than the “allowed” amount of such claim under 11 U.S.C. § 1325(a)(5)(B)(ii). The “allowed” amount of such claim is determined by application of the provisions of 11 U.S.C. § 506(a) wherein “a claim is secured only to the extent of the value of the property on which the lien is fixed; the remained of that claim is considered unsecured” *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 238–39, 109 S.Ct. 1026, 103 L.Ed.2d, 290 (1989).

Although § 506(a) allows bifurcation of claims into their secured and unsecured parts, claims which are secured only by a mortgage in the debtor's principal residence cannot be bifurcated under the “anti modification” provisions of 11 U.S.C. § 1322(b)(2). *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). However, *Nobelman* considered only whether the senior mortgage on a debtor's residence could be “stripped down” to its fair market value under 11 U.S.C. § 506(a). It did not address whether a wholly unsecured junior mortgage could be “stripped off” completely and rendered entirely unsecured. Since *Nobelman*, a majority of the courts addressing the “strip off” issue have found that the anti modification provisions of § 1322(b)(2) do not prevent a “strip off” of a wholly unsecured junior mortgage. See, *In re Tanner*, 217 F.3d 1357 (11th Cir.2000); see also, *First Bank, Inc. v. Van Wie, (In re Van Wie)*, 2003 WL 1563959 (S.D.Ind.) at *3 and cases cited therein.

The mortgage interest of Wells Fargo in the subject property is the third priority lien interest in that real estate, behind the first priority real property tax lien of Porter County, Indiana and the first mortgage lien asserted by BAC Home Loan Servicing, LP. The record

establishes that the amount of real property taxes to be taken into consideration is \$2,203.30, and that the amount of the debt subject to the first mortgage lien interest is \$108,781.89. The critical factual question for determination is the fair market value of the real property: if that value exceeds \$110,985.19, the debtors' plan must provide for the claim of Wells Fargo as a fully secured claim; if the value of the subject real estate is less than that amount, the entirety of the claim of Wells Fargo may be treated as a general unsecured claim.

The trial obviously focused principally upon the competing values ascribed to the property by each party. The O'Neills presented valuation evidence through two witnesses, Penny O'Neill and James Spencer; Wells Fargo presented its valuation evidence through Timothy Richardson. All three of the witnesses are deemed by the court to qualify as expert witnesses as to the matters to which they testified. An owner of real property is always a competent witness to express an opinion of value as to the property which he or she owns. Interestingly enough, in this case Mrs. O'Neill has extensive experience in real estate sales and marketing, experience which the court deems to qualify her as an expert witness. Both Mr. Spencer and Mr. Richardson are qualified as experts by reason of their extensive experience in real estate marketing and appraisals. There is thus a true battle of the experts to determine the fair market value of the real estate. As the court noted at the conclusion of the trial, the case is somewhat remarkable due to the relatively wide disparity between the values ascribed to the property by the O'Neills and by Wells Fargo. While Mrs. O'Neill did not actually perform a true appraisal by reviewing sales of comparable properties, she did perform general on-line research which served as a factual underpinning for her opinion. Both Mr. Spencer and Mr. Richardson performed what the court deems to be essentially standard residential real estate appraisals, the primary factual basis for which was sales of properties which each appraiser deemed to be "comparable" to the subject residence. Review of the comparables utilized by each of the appraisers discloses that each was able to locate properties having a residential

structure relatively similar to the O'Neills' house, in that all of the comparables are ranch-style homes. However, with the exception of one property utilized by Mr. Richardson, none of the comparables is in the immediate neighborhood of the subject property, and in fact most of them are located some distance away, primarily to the north. Putting aside the fact that none of the comparables is identical to the subject property and that all of the comparables require some adjustment in relation to the subject property in the manner in which appraisers make such adjustments, in its initial review of the appraisal evidence, the court was impressed with the quality of both appraisals and the techniques used by each of the appraisers and also by the apparent relevance of each set of comparables used by each appraiser to valuation of the subject property. Resultantly, the court determined that a viewing of the subject property and the comparables used by both appraisers was necessary to provide a complete evaluative basis for determination of the fair market value. The court conducted a telephonic conference with counsel for both parties, which resulted in both parties' consent to the court undertaking a field trip to externally view the subject property, the comparables, and the neighborhoods in which all of those properties are located. The court extended an invitation to both counsel to come along for the ride, so to speak, but both counsel declined to do so. The court conducted its "field trip" on November 1, 2011, accompanied by Judicial Assistant Susan M. Degnan. The subject property and all properties mentioned by either appraiser were viewed, as were the neighborhoods in which each of the properties is located.²

The opinions of value expressed by both Mr. Spencer and Mr. Richardson were based

² As the court advised counsel for the parties, in his prior life the author of this opinion was involved in a number of cases concerning valuation of real estate, principally eminent domain proceedings involving the United States of America. Particularly in this latter context, the author and his present Judicial Assistant did a number of field trips to review asserted comparable properties. Based on this experience, the court is convinced that actual physical viewing of properties involved in determination of value is at times necessary in order to fully evaluate the evidence of value to be dealt with.

exclusively on the comparable sales valuation method. In the context of this case, the court accepts this approach as the most relevant and reliable valuation methodology. As the court stated in its record #68 Memorandum of Decision in the Chapter 13 case of *Daniel F. Kolodziej and Valerie R. Kolodziej*, (Case Number 09-21223):

Deriving a fair market value for real estate is best done by one of two ways: either a relatively recent sale of the subject property itself, adjusted for subsequent trends in the market; or sales relatively recent to the date of valuation of the subject property with respect to comparable properties.⁵

⁵The concept of “comparable sales” has been addressed in a number of federal court decisions, principally those that involve federal eminent domain proceedings. The issue in federal condemnation is the value of property on the date of the taking, an issue very similar to valuation of an allowed secured claim for purposes of confirmation of a Chapter 13 plan. As stated in *Trout v. United States*, 386 F.2d 216, 222-223 (5th Cir. 1967):

In presenting this evidence of comparable sales to prove that special benefits to the remainder nearly offset the landowners' loss of 210 acres, the Government was making as strong a case as could be expected; for the courts have said repeatedly that comparable sales—sales from a willing seller to a willing buyer of similar property in the vicinity at or about the same time – constitute the best evidence of market value. See, e.g., *United States v. 60.14 Acres of Land, etc.*, 3d Cir. 1966, 362 F.2d 660, 665; *United States v. Whitehurst*, 4th Cir. 1964, 337 F.2d 765, 775; *United States v. Featherston*, 10th Cir. 1963, 325 F.2d 539; *United States v. 5139.5 Acres of Land, etc.*, 4th Cir. 1952, 200 F.2d 659; *Baetjer v. United States*, 1st Cir. 1944, 143 F.2d 391, 397.

The concept that a comparable sale must be “in the vicinity” of the subject property has been repeatedly stated in federal condemnation litigation, as stated in *United States v. 5139.5 Acres of Land*, 200 F.2d 659, 662 (4th Cir. 1952):

The rule is well settled in most jurisdictions that ordinarily ‘the value of lands, or interests in realty, at a particular time, may be proved by evidence of

voluntary sales of similar property in the vicinity,
made at or about the same time.

A comparable sale must resemble the subject property with respect to the location of the comparable sale, among other factors, as stated in *United States v. 534.28 Acres of Land*, 442 F. Supp. 82, 84-85 (M.D.Pa. 1977):

Sales of comparable land in the area provide valuable assistance in determining fair market value. See *United States v. Featherston*, 325 F.2d 539 (10th Cir. 1963). A comparable sale must be one that sufficiently resembles the parcel in question with respect to time, place and circumstances that reasonable men would consider it in evaluating fair market value. Nichols on Eminent Domain, s 13.02(4) "Selection and Presentation of Comparable Sales."

However, when comparable sales data is lacking, the valuation to be placed upon real estate becomes more problematic, as stated as follows in *Baetjer, et al. v. United States*, 143 F.2d 391, 397 (1st Cir. 1994):

On their faces the deeds show transactions, apparently at arm's length, in lands on Vieques in the vicinity of those taken at about the time of the taking. Clearly such transactions have a tendency to show fair market value. In fact, in the absence of recent transactions of a like nature involving the land taken itself, they are the best evidence of market value. What comparable land changes hands for on the market at about the time of taking is usually the best evidence of market value available. In the absence of such evidence a determination of value becomes at best only a guess by informed persons. *United States v. Miller*, 317 U.S. 369, 375, 63 S.Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55.

As the foregoing authorities generally state, the most critical elements in determining a comparable are the relative similarity of the property to that being valued, and two elements involving proximity – one of time of sale and the other of location. The closer in time a comparable sale is to the date of valuation of the subject property, the more likely it is that the comparable sale takes into account relatively current market trends. The closer in proximity a

comparable sale is to the subject property, the more the property shares in common with the valuation subject in terms of valuation trends in a particular location and characteristics of a particular location.

First a note about valuation dates. James Spencer's appraisal was done on September 13, 2010; Timothy Richardson's appraisal was performed with an effective date of November 12, 2010. The court deems the two months' difference between the effective dates of each appraisal to be immaterial, and thus each appraisal is equally relevant with respect to proximity of the valuation date to the date of actual determination of value.

During her testimony, Penny O'Neill referred to research which she had performed with respect to valuation trends in the Hobart, Indiana zip code area, research which was admitted into evidence as the debtors' Exhibit 3. This exhibit was printed out on July 1, 2011. The court largely discounts the relevance of Exhibit 3 because its statistical analysis involves an unknown database of properties, including an unknown comparability of the properties in that database to the O'Neills' residence. Moreover, just as the court is skeptical of the "trending" valuation methods now used by local taxing authorities to determine fair market value of properties for the purposes of real property taxation, the court is skeptical of the "trends" stated in Exhibit 3 – again because the database used for those trends may or may not reflect comparability factors with respect to the subject real estate. The bottom line is that the court deems Exhibit 3 to be of little, if any, relevance to the factual issue of valuation of the O'Neills' residence.

Both Mr. Spencer and Mr. Richardson utilized standard appraisal techniques in both obtaining their comparable sales and in evaluating them. Neither appraiser conducted an interior inspection of any of the comparables. Mr. Spencer did not conduct an interior review of the O'Neills' residence at the time he did his appraisal, while Mr. Richardson did fully inspect the interior of that house in conjunction with his appraisal. Penny O'Neill's testimony highlighted several conditions of the house which in her view diminished its sales value. Mr. Spencer

inspected the interior of the house prior to his trial testimony, and testified that based upon its interior condition – including those items mentioned by Mrs. O’Neill – his opinion of value would be adjusted downward by \$3,000.00-\$4,000.00. It is worth noting the “defects” noted by Mrs. O’Neill in her testimony, which were demonstrably evidenced by the debtors’ Group Exhibit 9. Defects are comprised of plaster damage in several locations in the house, a non-functional over-the-range microwave oven, an assertedly unusable shower in the 3/4 bath due to lack of water pressure, recurring mold in one small area, and recurring back-up of water around a window as a result of ice damming resulting in deterioration of the molding around that window³. As stated, these “defects” were viewed by Mr. Richardson in formulating his opinion of value in November of 2010, resulting in a value of \$138,000.00. Mr. Spencer’s valuation report in September of 2010 valued the subject property at \$110,000.00, and his subsequent visual inspection of the “defects” resulted in his testimony that his then-current valuation would be reduced by \$3,000.00-\$4,000.00. Mrs. O’Neill testified that in her opinion, her home had a fair market value of between \$105,000.00 and \$110,000.00. The relatively minor “defects” in the O’Neills’ nearly 50-year old home do not in the court’s view significantly affect its value in relation to other similar properties.

The exterior of the home presents extraordinarily well; the exterior of the home appears to have been well maintained throughout the years. The court mentions this to emphasize that both appraisers’ comparable sales were based upon information obtained without viewing the interiors of any of the comparables, and thus based upon information provided by either the

³ Interestingly, Mr. Richardson’s appraisal describes the subject property as having 2.25 baths and 7 rooms, while Mr. Spencer’s appraisal describes the property as having 1.75 baths and 8 rooms. The floor plan attached to Mr. Richardson’s appraisal establishes 2.25 baths, and that the discrepancy in room count is probably attributable to whether one counts the apparently undivided living room/ dining room area as one big “room”, or two functionally differentiated “rooms”. For what little difference it makes, the court will use 2.25 baths and 8 rooms as the subject’s characteristics for reviewing comparables.

property owner, the listing broker, or both. In his cross-examination of Mr. Richardson, Attorney Schmidt was able to establish that several of the comparables utilized by Mr. Richardson had features in some part significantly different from those of the subject property. A part of this cross-examination focused upon the description of several of the comparables as “immaculate” or words to that effect, and as the court noted, one comparable was actually described as a “cream puff”. In this context, because neither appraiser viewed the interior of any comparable, the apparent condition of the interior of any comparable derived from an adjective used in a listing description in relation to the condition of the interior of the subject residence has little materiality.

Before proceeding with the meat of this opinion as to the court’s evaluation, one final note must be made as to the admittedly accepted practice of appraisers whereby adjustments are made by comparing certain conditions or qualities of properties in order to seek to establish a more accurate picture of comparability of properties or structures which are not truly comparable. As Mr. Spencer stated in his testimony, an ideal comparable is “the house next door and identical and sold the day before”. Apart from circumstances which may have existed at one time in Levittown, Pennsylvania or other similar planned communities, this “ideal” comparable very rarely exists in nature. Given that different purchasers place emphasis on different factors and components with respect to a piece of real estate or a structure on the real estate, it is an inexact science indeed to add or subtract value to a comparable in relation to the subject property to seek to come close to the ideal of a comparable. As a result, as somewhat alluded to by Mr. Spencer, the closest one will come to a comparable in this case is a relatively recent sale of a relatively similar home in the relative location of 205 East 11th, Hobart, Indiana. Remarkably, using similar techniques, Mr. Richardson’s comparables involve sales of ranch homes for values ranging from \$124,900 to \$168,000, while the comparables used by Mr. Spencer in his appraisal report include two of under \$110,000. It is this difference in base

comparable evaluation that caused the court to make its field trip.

The principal purpose of the court's viewing of the subject property and comparables utilized by both appraisers was to give the court a sense of the "likeness" of the comparables to the subject property, primarily with respect to external appearance, the nature of any positive or negative factors in immediate proximity to a property which might influence value or comparability, the nature of the neighborhood in which each property was located in relation to potential value or comparability, and any other factors which might positively or negatively differentiate a comparable from the subject property. It must be emphasized that in doing its inspection, the court did not review the differences in configuration of internal space, finished living area (including whether or not a structure had a basement), or other factors noted in the listing data sheets used by each of the appraisers. However, neither appraiser viewed the interior of any comparable. As stated, the inspection was done on November 1, 2011, and on that afternoon the author reviewed notes which had been taken and derived certain conclusions with respect to certain aspects of comparability. The court evaluated each comparable on the basis of a comparability scale, based upon the foregoing criteria: "comparable", "not very comparable" and "not comparable at all". The following is a summary of the court's evaluation:⁴

A. The subject property, 205 East 11th Street, Hobart, Indiana. The subject property is essentially at the end of a street, "essentially" because immediately to the west is an elementary school. The front and side lots of the subject property are narrow, and the backyard is not particularly deep. The backyard is enclosed by a fence, and immediately adjoins a cornfield. The subject home and the two others in the 200 block of East 11th are somewhat

⁴ Mr. Richardson stated that several of the properties which were designated in his appraisal report were not actually utilized by him in deriving his valuation, because they were simply listed properties which had had no recent sale. The properties utilized by Mr. Spencer all were the subject of a sale. A listing price is not a sale price, and in the court's view is of very limited value in determining the fair market value of a property. Be that as it may, the recitation which follows includes all properties mentioned by either appraiser in any manner.

larger, newer and better presenting than the rest of the immediate neighborhood. Apart from one's views of proximity to an elementary school, the neighborhood in which the subject is located is comprised of somewhat older homes, all well-maintained, in an essentially quiet residential neighborhood in close proximity to the main route to downtown Hobart, and the primary route to access areas further south in Lake County, Indiana from Hobart.

B. The properties designated by Timothy Richardson:

1. 1712 West Old Ridge Road. This property is located on a fairly major, busy east/west road, and the front of the structure is close to that road. As a result, this property has a shallow front yard abutting on a busy street. The immediate neighborhood to the north is different, with respect to the types of housing, from the neighborhood of the subject. This property is not proximate to the subject property. The court deems this property to be "not very comparable" in relation to the criteria by which this evaluation is made.

2. 2310 East Cleveland Avenue. This property is on a relatively busy east/west street. The housing in the immediate vicinity is very mixed in terms of age and quality to that of the comparable. It is not in a relatively homogenous neighborhood in terms of housing. It has a very large lot. This property is not proximate to the subject property. This property is deemed to be "not very comparable".

3. 2118 West 3rd Place. The immediately adjoining "neighborhood" is comprised of a relatively new development to the north, mixed with what is apparently tract housing built in perhaps the 1950s. This property has a standard small subdivision lot, and the structure is more upscale than the general area in which the subject is located. This property is in a way the least proximate in location to the subject, being 1-1 ½ miles west of the center of downtown Hobart. This property is deemed to be "not very comparable".

4. 260 Crestwood Drive. This property is in the same general neighborhood as 2118 West 3rd Place. It is on a dead end street. It has relatively remote proximity to the

subject property. This property is deemed to be “not very comparable”.

5. 1306 South Hobart Road. This property is in the “same part of town” as is the subject, being within 1 mile of the subject on “the same side of town”. However, the location is essentially rural and kind of “farmy”. This property has a large lot, and the structure is essentially the same style as is the subject property. However, there is what can only be described as a “slum” to the south of it with a number of collapsed out-buildings. This property is deemed to be “not very comparable”.

6. 2615 Drexel Drive. This property does not present as well externally as does the subject. It is in an older subdivision, similar in some respects to the neighborhood in which the subject property is located. It has slightly more side yard space than does the subject. It is not in proximity to the subject. This property is deemed to be “not very comparable”.

7. 1118 State Street. This property is two blocks from the subject, and is located in the same neighborhood as is the subject. However, it has a much larger lot, including a much larger backyard. The structure is of the same basic ranch style as is the subject. The property has a “funky” semi-circular drive, more appropriate to a much larger home. It does not present as well from the street as does the subject. In terms of the court’s criteria, this property is the most comparable to the subject of all those utilized by either appraiser, in terms of proximity and nature of the neighborhood.

C. Comparables designated by James Spencer.

1. 3433 North Lake Park Avenue. This property is not at all in proximity to the subject, being located on the very north side of Hobart, in immediate proximity to New Chicago and Lake Station. It is located on a very busy north/south road. Commercial business establishments are located in the immediate vicinity of this property. Its external presentation is not favorably comparable to that of the subject. Due primarily to its location and the nature of

the surrounding neighborhood, this property is deemed to be “not comparable at all”.

2. 207 North Wabash. This property is located approximately 1.2 miles north of the subject, on the north side of Hobart. It is in a neighborhood of middle-aged homes. One block to the west is a huge electric transmission facility. The house is located on an extremely odd lot configuration: there is an alley on the east side, an essentially unusable garage which fronts a narrow street on the north side, and a small fenced in back yard. The configuration of the structure on the lot results in an irregular presentation of its appearance. This property is deemed to be “not comparable at all”.

3. 2021 Third Street. This property has no proximity to the subject, being located 1-1 ½ miles west of downtown Hobart. The surrounding housing is more upscale than is the neighborhood of the subject. It is a standard, small subdivision lot, but a very small subdivision lot. The lack of proximity causes this property to be “not very comparable”.

4. 2213 East Cleveland. This property is not designated in either appraisal report, but is a property with respect to which James Spencer gave testimony; information about this property was admitted as Exhibit 8. It is in the same neighborhood as 2310 East Cleveland (see above). It therefore has remote proximity to the subject. A very unappealing house stands almost directly across the street from this property. The property has no garage. The backyard abuts a farm field. General comments concerning 2310 East Cleveland Avenue apply to this property. This property is deemed to be “not very comparable”.

The court appreciates the difficulty encountered by both appraisers in identifying comparable properties with respect to the subject. Hobart is an area of mixed housing. Certain of the comparables do not share the neighborhood characteristics of the subject, both with respect to its relative seclusion from busy streets and its sense of an identifiable neighborhood. Based upon all of the factors in evidence, and the court’s evaluative viewing of the properties, the most comparable property is the one in the immediate location of the subject, i.e., 1118

State Street. Admittedly, the physical characteristics of the structure and its improvements causes this property to have a higher fair market value than does the subject. A major factor is that the subject has no basement, while 1118 State Street has a finished basement. However, the subject property has significantly more square footage of gross living area, more total rooms, and (albeit there may be problem with one of the baths) 2.25 baths as contrasted to one bath at 1118 State Street. This property has a larger lot than does the subject. This property sold for \$150,000.00 on May 28, 2010. Timothy Richardson's adjustment to comparable for this property puts its value at \$135,037.00. The two comparables used by Mr. Spencer to derive a \$110,000 value are not comparable in presentation or location, and comparing structures – both have significantly less gross living area than does the subject, have fewer baths, and the house at 3433 North Lake Park Avenue is 72 years old.⁵ A difficult task for Mr. Spencer to do, but he didn't succeed in locating "comparables" that the court views as comparable to the subject in any way. The court finds that the value ascribed by Wells Fargo is the more accurate of the values asserted by the parties.

Because of the "all or nothing" nature of the issue addressed by this adversary proceeding, it is unnecessary for the court to determine a "cram down" value for the subject real estate, which would be a much more difficult endeavor given the paucity of real comparables and the need to review adjustments of those comparables to determine the actual fair market value of the subject. The determination to be made by the court boils down to which of the two values the court deems to be more reflective of the value of the subject property: the O'Neills' value of less than \$110,985.19, or Wells Fargo's value of more than that amount. The court determines that the valuation of Wells Fargo of \$138,000.00 relatively accurately reflects the

⁵ The record establishes that several of Mr. Spencer's comparables were "bank owned" or "estate" properties, which the record establishes does potentially affect the market value of a sale because of a greater propensity to "unload" the property quickly rather than hold out for a higher price. Mr. Richardson testified that he did not use such sales in his appraisal.

fair market value of the subject property for the purposes of this adversary proceeding.

IT IS ORDERED, ADJUDGED AND DECREED as follows:

A. The fair market value of 205 East 11th Street, Hobart, Indiana for the purposes of this adversary proceeding is determined to be in excess of \$110,985.19.

B. The indebtedness owed by the O'Neills to Wells Fargo, secured by Wells Fargo's second mortgage in the subject real estate, cannot be treated as an unsecured claim with respect to any plan proposed by the debtors in this case, and must be provided for under 11 U.S.C. §1322(b)(2).

Dated at Hammond, Indiana on February 3, 2012.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

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