

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-12681-JMD  
Chapter 13Mark E. Ferman,  
Debtor*Nancy H. Michels, Esq.  
MICHELS & MICHELS  
Attorney for Debtor**John P. LeBrun, Esq.  
GOLDMAN & LeBRUN, P.A.  
Attorney for Sara Ferman**Lawrence P. Sumski, Esq.  
Chapter 13 Trustee*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

Mark E. Ferman (the “Debtor”) filed a petition under Chapter 13 of the Bankruptcy Code on September 21, 2000. In his Chapter 13 Plan dated October 5, 2000 (the “Plan”) he valued certain property owned by him on Little Bear Island in Tuftonboro, New Hampshire (the “Camp”) at \$95,000.00 for purposes of confirmation of the Plan. Sara Ferman (the “Creditor”) is a judgment creditor with an attachment on the Camp in the amount of \$250,000.00. Her attachment is junior to a mortgage to Meredith Village Savings Bank in the amount of \$80,335.99. The Creditor objected to the Plan and the confirmation of the Plan based upon the undervaluation of the Camp by the Debtor and the resulting underpayment to her under the Plan. The Creditor claimed that the Camp had a value of \$152,000.00.

On May 24, 2001 the Court held an evidentiary hearing on the sole issue of the value of the Camp. The parties stipulated that their respective appraisers were qualified by their knowledge, skill, experience and

training to testify as experts on the value of the Camp and that both of their appraisal reports could be admitted into evidence. The Court found that both appraisers were qualified and that their technical and other specialized knowledge would assist the Court in determining the value of the Camp. See Fed. R. Evid. 702. At the hearing, the Creditor filed an amended objection to the Plan and the confirmation of the Plan reflecting the value of the Camp as determined by her appraiser. Debtor's counsel indicated that the Debtor's appraiser had valued the Camp slightly higher than the value in the Plan and that a revised Chapter 13 plan would be filed after the Court determined the value of the Camp.

An appraisal report prepared by Michael J. O'Neill valuing the Camp at \$128,000 as of September 21, 2000, the petition date, Exhibit 101, was offered by the Creditor and admitted into evidence. An appraisal report prepared by Kendal G. Seely valuing the Camp at \$102,000 as of March 30, 2001, Exhibit 1, was offered by the Debtor and admitted into evidence. Both appraisers testified as to their opinions of value. At the conclusion of their testimony, the Court took the matter under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## **II. DISCUSSION**

Both appraisers used the same methodology and approach in reaching their opinions of value of the Camp. The appraisers agreed that the current use of the Camp as a seasonal residence was the highest and best use for the property and that the cost and income approaches to valuation were not appropriate for determining the value of the Camp. Both appraisers testified credibly in support of their appraisal reports and their opinion of the value of the Camp. Both appraisers used the sales comparison approach, giving equal weight to all comparative sales, to reach their opinion on the value. Accordingly, the Court's analysis

focused on the differences between the appraisers regarding the properties selected as comparative sales, the adjustments to the value of the comparative sales and the basis for such adjustments.

### **1. The Debtor's Appraisal Evidence**

None of the comparable sales used by the Debtor's appraiser were from the island on which the Camp is located. In fact, they were all from Rattlesnake Island which is located in the broadest portion of Lake Winnepesaukee and were further from boat slips and stores on the mainland. Consequently, such properties experience greater problems with boat access and mooring in adverse weather conditions than properties similar to the Camp. All three of the comparable sales used by the Debtor's appraiser were in much better physical condition than the Camp. The Debtor's appraiser found that the Camp was of "average to less than average condition" and that "the entry way deck and stairs are rotted and need to be replaced." See Exhibit 1. She also testified that the Camp needs repair work before it could be used as a seasonal residence while the comparable sales could all be used immediately. Her appraisal report reflected that the three comparable sales were in average to above average condition. The appraisal report also reflects her opinion that the quality of construction of the Camp was average while the three comparable sales were of average to greater than average quality.

Due to the differences in overall quality and condition, the Debtor's appraiser adjusted the gross market prices of her three comparable sales downward by \$22,800, \$12,800 and \$15,200, or 21%, 10% and 14%, respectively. Those adjustments may be an accurate reflection of the numerical difference that the market would apply to valuing the Camp. However, when comparable sales require large percentage adjustments to account for overall condition or quality and not discrete and identifiable improvements, such as a permanent dock or a septic system, the Court finds that the judgment of the appraiser tends to become a more significant factor in the final opinion of value than the judgment of the market. Valuation through the comparable sales approach assumes that the properties valued by the market are comparable enough to the subject property that the adjustments by the appraiser are relatively small and that the value is primarily determined by the market, not the appraiser. The large adjustments to the comparable sales used by the

Debtor's appraiser may be appropriate and may accurately reflect the market's response to the subject property. However, greater reliance on the appraiser's judgment than on the market's judgment places a greater burden on the party relying on such an appraisal to justify the adjustments and the appraiser's judgment. The Court's view on the impact of such adjustments is supported by the testimony of both appraisers that generally applicable standards in residential appraisals seek to have the total adjustments to the market value of a comparable sale be no more than 25% of the gross selling price or 15% of the adjusted selling price. The Debtor's appraiser was required to apply adjustments ranging from 62.19% to 86.30% of the gross market price and 2.72% to 23.62% of the adjusted sales price of the three comparable sales.

The Creditor's appraiser utilized four comparable sales that in his judgment were of comparable quality of construction, but were all in better physical condition. His downward adjustments to the gross market values of his comparable sales for overall condition and quality were \$5,000, \$5,000, \$10,000 and \$15,000. His overall adjustment to the gross market price of his comparable sales ranged from 23.7% to 51.5% and 7.9% to 15.8% of the adjusted sales price. Neither party strenuously challenged the comparable sales used by the other party's appraiser. Both appraisers testified that the generally applicable guidelines for adjustments to the market prices of comparable sales are difficult to follow when a property is somewhat unique or the market data does not provide good comparable sales. Both appraisers agreed that the Camp is somewhat unique and the range of factors such as location, size, shore frontage, waste disposal system and boat docking facilities among the available comparable sales made it impossible to limit adjustments to comparable sales to generally applicable appraisal standards. On balance the Court finds that the comparable sales utilized by the Debtor's appraiser reflected more variation in location and similarity to the Camp than those used by the Creditor's appraiser. Accordingly, the Court will give somewhat greater weight to the Creditor's comparable sales than the Debtor's comparable sales because they are more reflective of the market's judgment.

## **2. The Creditor's Appraisal Evidence**

The Debtor's appraiser testified that her opinion on the condition and quality of the Camp was based on her inspection of the interior of the Camp and her previous inspections of the interior of each of the comparable sales. The Creditor's appraiser had only viewed the Camp through a window and had not inspected the interior of any of his comparable sales. In the Court's experience, residential appraisers usually inspect the interior of the subject property, but rarely inspect the interior of the comparable sales. Accordingly, the absence of such inspections by the Creditor's appraiser does not raise any general concerns. However, the testimony at the hearing did reveal several items that an opportunity to inspect the Camp or speak with the Debtor would have revealed and which are significant to the opinion of value. The Creditor's appraiser observed various pieces of a pipe dock on the shore of the Camp and assumed that the dock had been removed for the winter. The Debtor's appraiser and the Debtor both testified that the pipe dock had been damaged by ice several years ago and that no usable dock exists. The existence of a dock was an item considered by both appraisers in evaluating every comparable sale. The range of adjustments for non-permanent docks range from \$2,500 to \$6,000. Accordingly, the Court finds that the Camp does not have a usable dock and a downward adjustment in the sales price of the Creditor's comparable sales Nos. 1, 2 and 4 in the amount of \$4,000 is warranted.

The limited inspection of the Camp by the Creditor's appraiser also caused him to conclude that the property had a hearth for the wood stove. The testimony revealed that the wood stove only had a metal sheet or pan under it, not a masonry or stone hearth. He made no adjustment to comparable sales Nos. 1, 2 and 4, all of which have hearths, and he made a positive adjustment of \$1,500 to comparable sale No. 3 to adjust for the absence of a hearth. The Court will make a downward adjustment in comparable sales Nos. 1, 2 and 4 in the amount of \$1,500 to reflect the absence of a hearth in the Camp.

The Creditor's appraiser gave equal weight to comparable sales Nos. 1, 2 and 3 in arriving at his opinion of value and used comparable sale No. 4 to support his opinion. Comparable sale No. 4 was the only comparable sale used by either appraiser that was located on the same island as the Camp. Apparently the Creditor's appraiser did not factor it into his opinion because the market price was from a three year old

sale and, therefore, required a significant adjustment for the date of sale alone. The adjusted values used by the Creditor's appraiser and the Court's adjustments are as follows:

Comparable Sale No.	Appraiser's Adjusted Sales Price	Court Adjustment	Court's Adjusted Sales Price
1	\$118,700	-\$5,500	\$113,200
2	\$137,685	-\$5,500	\$132,185
3	\$126,265		\$126,265
Total	\$382,650	<del>                    </del>	\$371,650
Average	\$127,550	<del>                    </del>	\$123,883
4	\$128,625	-\$5,500	\$123,125

Based upon the Court's adjustments to the comparable sales used by the Creditor's appraiser, and using comparable sale No. 4 as support, the Court finds that the Creditor's appraisal evidence established a value of \$123,500 as of September 21, 2000.

### 3. Valuation Date and Reconciliation of Appraisal Evidence

The Court must determine the date of valuation of the Camp. The Debtor argued that the date of confirmation should govern. While many courts have ruled that collateral should be valued as of the effective date of a Chapter 13 plan for purposes of determining the amount of a secured creditor's claim in the cram down context, see Collier on Bankruptcy at ¶ 506.03[10] (Lawrence P. King ed., 15<sup>th</sup> rev. ed. 1999) (citing numerous cases), this Court has previously ruled that the date of valuation is the date of the filing of the Chapter 13 petition, see Ford Motor Credit Co. v. Phillips (In re Phillips), 142 B.R. 15, 16-17 (Bankr. D.N.H. 1992) (Yacos, J.). The Court finds that in the context of this case September 21, 2000, the petition date, should be the date of the valuation of the Camp.

The Creditor's appraisal evidence established a value of \$123,500 as of September 21, 2000. The Debtor's appraisal evidence established a value of \$102,000 as of March 30, 2001. Both appraisers used a time adjustment of 6% annually. Accordingly, the Debtor's appraisal evidence established a value of

\$99,000 as of September 21, 2000.<sup>1</sup> Because the Court finds that the Creditor's comparable sales were more reflective of the market's judgment and subjected to smaller adjustments by the appraiser, the Court gives somewhat greater weight to the appraisal evidence of the Creditor rather than the Debtor. For that reason, the Court finds that the Camp's value as of September 21, 2000 was \$115,000.

### III. CONCLUSION

The Court finds that the Debtor undervalued the Camp in the Plan. The value of the Camp as of the petition date was \$115,000. In order to meet the Chapter 13 confirmation requirements set forth in the Bankruptcy Code, the Debtor will be required to provide the Creditor with payments, over the life of the plan, that will total the present value of the Creditor's allowed secured claim. See 11 U.S.C. § 1325(a)(5)(B)(ii).

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 4<sup>th</sup> day of June, 2001, at Manchester, New Hampshire.

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J. Michael Deasy  
Bankruptcy Judge

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<sup>1</sup>  $\$102,000 - (\$102,000 \times .03) = \$98,940$ , rounded off to \$99,000.