THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: January 10, 2017

Susan V. Kelley
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re
Clarence E. Johnson, Jr.,
Debtor.

Chapter 13
Case No. 16-26048-svk

Clarence E. Johnson, Jr.,
Plaintiff,

v.

Adversary No. 16-02306

US Bank National Association,
Defendant.

ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS

On August 8, 2016, the Debtor filed an adversary complaint seeking to establish the value of the Defendant's interest in his homestead, located at 5260 N 37th Street, Milwaukee, Wisconsin (the "Property"). The complaint is supported by a broker's price opinion of $30,550, and the Defendant does not dispute that valuation for the purposes of this motion.[1] The complaint asserts the value of the Property is less than the amount due and owing to the holders of liens senior to the Defendant's lien.

Senior to the Defendant's lien at issue, the Property is encumbered by tax liens in the amount of $6,421.32,[2] another mortgage held by U.S. Bank, National Association ($21,342.15[3]), and two liens the Debtor's parents granted to the City of Milwaukee (the "City") as part of a rehabilitation loan program ($665[4] and $15,000[5]). These liens total $43,428.47. Since there is no equity in the Property to which the Defendant's junior lien can attach, the Debtor argues that

[1] The complaint also observes that the Debtor valued the Property at $24,342 on Schedule A/B.
[2] Docket No. 1, Exhibit G at 40; Claim No. 2-1, Exhibit B.
[3] *Id.*, Exhibit F at 38 (amount stated in complaint); Claim No. 12-1 ($21,673.84) (amount stated by Defendant).
[4] *Id.*, Exhibit E at 21-26.
[5] *Id.*, Exhibit E at 27-33.

the claim is unsecured under 11 U.S.C. § 506(a), and the Debtor may modify it pursuant to § 1322(b) to provide it will be released on completion of a Chapter 13 plan.

The Defendant filed a motion for judgment on the pleadings, arguing based on the equities that the Court should depart from the general practice of deducting senior liens from the value of the Property in determining the extent to which a junior claim is secured under § 506(a). The Defendant categorizes the City's liens as "contingent liens" and asserts the Court ought to value them at $0 because the probability of the City foreclosing is "infinitesimal."[6] If the City's liens are eliminated from the calculation, the other senior liens total less than the value of the Property according to the broker's price opinion. There would be equity to which the lien at issue could attach, and the Debtor could not strip off the lien. The Debtor did not file a response to the motion.

The Court reviews a motion for judgment on the pleadings using the same standard applied when reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). Thus, the Court views the facts in the complaint in the light most favorable to the non-moving party, granting the motion "only if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Northern Ind. Gun and Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998) (internal quotations omitted).

The documents attached to the complaint include forbearance agreements, mortgages and promissory notes payable on demand from Clarence and Clara Johnson to the City.[7] The complaint indicates that Clarence and Clara are the Debtor's parents. The forbearance agreements provide that the City will take no action to collect on the notes or foreclose the mortgages until certain conditions occur, one of which is that the Property ceases to be the homestead of at least one debtor.[8] The complaint alleges that the Debtor's father has died and his mother lives in Cleveland, so it appears one of the conditions permitting the City to exercise its rights under the mortgages has occurred.[9] The City did not file a proof of claim for its mortgages.

The Defendant relies on cases that discount "vanishing liens" in performing a lien avoidance analysis. For example, the Defendant cites *Mays v. HUD (In re Mays)*, 85 B.R. 955 (Bankr. E.D. Pa. 1988), *aff'd*, Civil Action No. 88-4306, 1988 U.S. Dist. LEXIS 8427 (E.D. Pa. Aug. 1, 1988), a pre-*Dewsnup v. Timm*, 502 U.S. 410 (1992) Chapter 7 case. In *Mays*, the debtor purchased a home as part of a program administered to rehabilitate abandoned homes and sell them to low-income buyers. In addition to signing a purchase money mortgage for the value of the home, the debtor also signed a confessed judgment for the difference between the costs of rehabilitating the home and the mortgage. The confessed judgment provided that the obligation would decrease by 20% each year as long as the debtor maintained title and lived in the home. *Id.* at 957. When the lien strip action was decided, the obligation would be eliminated completely if the debtor continued to live in the house for six months. The court was troubled by

[6] Docket No. 10 at 3.
[7] Docket No. 1, Exhibit E.
[8] *Id.*, Exhibit E at 24 and 32.
[9] *Id.* at ¶ 7(a).

the inequity of the debtor employing this "vanishing lien" to strip down a lien securing a home improvement loan the debtor incurred later, and the court valued the lien at $0. *Id.* at 963.

In *In re Moellenbeck*, 83 B.R. 630 (Bankr. S.D. Iowa 1988), the "vanishing lien" was a federal estate tax lien that would become unenforceable approximately five years after the matter came before the court if the debtors continued to farm the property as they stated they would. Encouraging the court to apply general equitable principles, the other lienholders argued that allowing the debtors to use the estate tax lien to reduce their claims without making payments to the IRS would result in a windfall to the debtors when the lien was released. *Id.* at 632. The court agreed and determined the debtors could not use the estate tax lien to reduce the allowed secured claims of the other lienholders, given the unlikelihood that the lien would be enforced and the fact that the debtors failed to treat the lien in their Chapter 12 plan. *Id.* Relying on *Moellenbeck*, the Defendant also contends that a senior lien used to reduce the claim of a junior lienholder must be treated in the plan.

Here, however, the City's liens are not "vanishing liens." According to the documents attached to the complaint, the loans were deferred payment loans. Although the Defendant believes it is unlikely the City will foreclose, the liens will continue to encumber the Debtor's Property following the bankruptcy. *See Dewsnup*, 502 U.S. at 418 (liens generally pass through bankruptcy unaffected). The Debtor will not in effect be avoiding the City's liens as well as the Defendant's lien.

The Court rejects the argument that a senior lien cannot be counted for lien strip purposes unless the senior lien is treated by the plan. Nothing in § 1322 or § 1325 requires a debtor to provide for the City's secured claims in order to obtain confirmation. *See* 11 U.S.C. §§ 1322(a), 1325(a)(5) (describing the required plan treatment for "each allowed secured claim *provided for* by the plan") (emphasis added). The City's liens will pass through the bankruptcy unaffected and continue to encumber the Property after bankruptcy. Therefore, the City's liens should be deducted from the value of the Property in determining the extent to which the Defendant's claim is secured. Accordingly,

IT IS THEREFORE ORDERED: the Defendant's Motion for Judgment on the Pleadings is denied. The Court will contact the parties to schedule an evidentiary hearing on the Complaint.

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