

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
CARTER AHLSTEDT,) CASE NO. BK02-40038
)
Debtor(s).) CH. 13

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on July 17, 2002, on Conseco Finance Servicing Corp.'s Objection to Confirmation of Debtor's Amended Plan (Fil. #51), and on the Chapter 13 Trustee's Objection to Confirmation of Debtor's Amended Plan (Fil. #54). Joe Hawbaker appeared for the debtor, Thomas Young appeared for Conseco Finance Servicing Corp., and Marilyn Abbott appeared for the Chapter 13 Trustee. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(L).

Conseco's objection to confirmation is overruled. The Chapter 13 Trustee's objection to confirmation is granted.

Conseco holds a promissory note and deed of trust on land in Antelope County, Nebraska. The acreage includes a modular home which is on a basement and foundation and is permanently affixed to the property. This is debtor's primary residence. Conseco took an additional security interest in the modular home and its stove, refrigerator, washer, dryer, and air conditioner.

In his amended plan, the debtor proposes to modify Conseco's claim by reducing the interest rate from the 12.99% contract rate to the 7.4% Wichmann rate. The debtor asserts that Conseco's additional security interest in the home's appliances removes Conseco's claim from the protection of 11 U.S.C. § 1322(b)(2), which prevents modification of a claim secured only by a security interest in real property which is the debtor's principal residence.

Case law on this issue draws a distinction between additional collateral which is "merely incident" to the interest in real property and has little or no independent value, and additional collateral which is personalty with value of its own.

For instance, boilerplate language in security documents

covering such things as rents, profits, royalties, mineral rights, easements, appurtenances, and sometimes even fixtures, generally does not permit a debtor to modify a lender's rights because such collateral is "associated with real property ownership and part of the bundle of real estate rights." In re Duran, 271 B.R. 888, 890 (Bankr. D. Wyo. 2001). See also In re Davis, 989 F.2d 208 (6th Cir. 1993); PNC Mortgage Co. v. Dicks, 199 B.R. 674 (N.D. Ind. 1996); In re Fountain, 197 B.R. 748 (Bankr. D.N.H. 1996); In re French, 174 B.R. 1 (Bankr. D. Mass. 1994).

In contrast, security interests in additional collateral which has more than nominal value separate and apart from the real estate generally take the claim outside the scope of § 1322(b)(2). See, e.g., Wilson v. Commonwealth Mortgage Corp. (In re Wilson), 895 F.2d 123 (3d Cir. 1990) (appliances and furniture are patently items of independent value); Hammond v. Commonwealth Mortgage Corp. (In re Hammond), 27 F.3d 52 (3d Cir. 1994) (following Wilson); Rolle v. Chase Manhattan Mortgage Corp. (In re Rolle), 218 B.R. 636 (Bankr. S.D. Fla. 1998); In re Cotton, 199 B.R. 967 (Bankr. D. Neb. (1996) (vendor of custom-built doors for house not protected by § 1322(b)(2) because the doors were personalty and independent of the real estate, and because vendor was not within class of creditors Congress sought to protect with § 1322(b)(2)).

There is a case with similar factual underpinnings in which the appliances in a mobile home were deemed to be incidental to the real estate for purposes of § 1322(b)(2). In In re Smith, 176 B.R. 298 (Bankr. D.N.H. 1994), the court said:

It is apparent in this case that the appliances were purchased with the mobile home since the financing in question was purchase money and the security interest in the appliances was given to the lender at the same time that the purchase money was provided. Further, the [debtors'] appraiser, who had extensive experience in the mobile home field, indicated when asked by opposing counsel that he had taken the value of the appliances into consideration when he conducted his appraisal even though he was hired to appraise the "mobile home." The Court finds on these facts and in the context of this mobile home financing that the appliances were an enhancement with little or no independent value and do not result in forfeiture . . . of the anti-modification protection

afforded by section 1322(b)(2).

176 B.R. at 302.

The evidence in this case, however, is not as strongly in favor of the lender as in the Smith case. The statement by Conseco that the appliances are built-in does not necessarily lead to the conclusion that they are an inherent part of the real estate. Conseco's own documents even describe the home itself and the specific appliances therein as "additional security." While there is no dispute that the modular home is now a permanent part of the real estate, it cannot be said that the appliances, which normally are personal property, have in this case become incidental to the lender's interest in the real estate.

Conseco Finance Servicing Corp.'s Objection to Confirmation of Debtor's Amended Plan (Fil. #51) is overruled.

The Chapter 13 Trustee's Objection (Fil. #54) is granted. The debtor shall file an amendment to clarify the amount the Trustee is to pay Conseco, both for adequate protection payments and for plan payments. Trustee is directed to pay Conseco adequate protection payments in a lump sum since the first receipt of debtor payments, at the contract interest rate and then, after confirmation, monthly, at the modified interest rate.

Separate order will be entered.

DATED: August 29, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Joe Hawbaker
Thomas Young
Chapter 13 Trustee
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
CARTER AHLSTEDT,) CASE NO. BK02-40038
)
Debtor(s).) CH. 13

ORDER

Hearing was held in Lincoln, Nebraska, on July 17, 2002, on Conseco Finance Servicing Corp.'s Objection to Confirmation of Debtor's Amended Plan (Fil. #51), and on the Chapter 13 Trustee's Objection to Confirmation of Debtor's Amended Plan (#54). Joe Hawbaker appeared for the debtor, Thomas Young appeared for Conseco Finance Servicing Corp., and Marilyn Abbott appeared for the Chapter 13 Trustee.

In accordance with the Memorandum filed this date,

IT IS ORDERED Conseco Finance Servicing Corp.'s Objection to Confirmation of Debtor's Amended Plan (Fil. #51) is overruled.

IT IS FURTHER ORDERED that the Chapter 13 Trustee's Objection (Fil. #54) is granted. The debtor shall file an amendment to clarify the amount the Trustee is to pay Conseco, both for adequate protection payments and for plan payments. Trustee is directed to pay Conseco adequate protection payments in a lump sum since the first receipt of debtor payments, at the contract interest rate and then, after confirmation, monthly, at the modified interest rate.

DATED: August 29, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Joe Hawbaker
Thomas Young
Chapter 13 Trustee
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.