UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
JOSET BLAKE,	)	CASE NO. BK94-80709
	)	
DEBTOR	)	CH. 13
		Filing Nos. 16, 22

MEMORANDUM

Hearing was held on August 15, 1994, on the Amended Plan filed by the debtor. Appearing on behalf of debtor was Casey Quinn of Quinn & Wright, Omaha, Nebraska. Appearing on behalf of Beneficial Nebraska, Inc., was Scott Rasmussen of Brown & Brown, P.C., Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(L).

Background

This Chapter 13 debtor owns residential real estate in which Beneficial Nebraska, Inc., d/b/a Beneficial Mortgage Co. (Beneficial) has a lien represented by a Trust Deed. The note, which is the obligation secured by the Trust Deed, matured more than one year prior to the bankruptcy filing. The lien represented by the Trust Deed has been foreclosed in a judicial foreclosure proceeding. The debtor filed this Chapter 13 case just prior to the time when a sale could have been held.

The plan of the debtor proposed to pay this creditor in full over a period of time. The creditor has objected on the basis that the Bankruptcy Code at 11 U.S.C. § 1322(b)(2) prohibits the modification of a claim secured only by the residence.

The property is worth approximately \$20,000. There is a first lien for real estate taxes in the amount of \$1,100, a second lien securing a debt of \$3,300, and the lien of Beneficial securing a claim of approximately \$4,500. The plan proposes to pay the Beneficial claim over the three-year life of the plan at the contract rate of interest of 15% per annum. Such a proposal to stretch out the payments on a matured debt over a period of years is quite clearly a modification of the claim.

Modification of Claims

The issue, in light of 11 U.S.C. § 1322(b)(2) which prohibits a plan from modifying "a claim secured only by a security interest in real property that is the debtor's principal residence," is whether Beneficial holds a claim secured only by a security interest in real property. The debtor acknowledges that the real property is the debtor's principal residence.

The Beneficial security document is a Trust Deed. The Trust Deed conveys an interest, for security purposes, in the "real property, including all buildings, improvements, and fixtures of every kind now or hereafter erected or placed on the real property."

The debtor points out that there is language in the Trust Deed that refers to the debtor's right to collect rents until the filing of a notice of default by the trustee. Under Nebraska law, historically, an interest in rents is not the equivalent of an interest in real estate. See Yeiser v. Jetter, 86 Neb. 352, 125 N.W. 632 (1910). If the language in the Trust Deed referring to rents is an assignment of rents from the debtor to the creditor as that term "assignment" is defined in Neb. Rev. Stat. § 52-1701(2), then the creditor has a security interest in property in addition to the residential real estate.

The language in the Trust Deed which is the subject of this litigation is the following:

> Trustor specifically confers upon Trustee that Power of Sale as provided in Nebraska law, and shall retain possession of the Property and collect the rents and revenues therefrom until filing of such Notice.

The "Notice" referred to is the "Notice of Default" provided for elsewhere in the document.

The Nebraska statutes as recently amended provide a means by which a creditor can perfect a security interest in rents without the need of judicial intervention and the appointment of a receiver. The amended statute provides retroactive application of the law to any assignment instrument properly recorded prior to February 17, 1993. See Neb. Rev. Stat. § 52-1701 et seq. and specifically § 52-1708 (1993 Supp.). Section 52-1701(2) defines an assignment instrument as "any mortgage, trust deed, assignment of leases, assignment of rents, or other instrument or agreement which creates, provides, assigns or grants a security interest in rents."

The debtor suggests that the language from the Trust Deed which refers to the right of the debtor to collect rents until a notice of default is filed gives the creditor more than a security interest in real estate which is the personal residence of the debtor.

The creditor agrees that the contractual language which prohibits the debtor from collecting rents after a notice of default is filed gives the creditor certain rights. However, it is the position of the creditor, with which this judge agrees, that the contractual right to prohibit the debtor from collecting rents is not the equivalent of a grant or an assignment of an interest in rents.

The Trust Deed language does not give to the creditor any interest in the rents. It assigns no interest in rents. It grants no security interest in rents. On the contrary, it is prohibitive in nature. That is, the language limits the right of the debtor to collect rents upon the occurrence of the filing of a notice of default. Under the Nebraska Trust Deed statute, the creditor, or stated more properly, the trustee of the Trust Deed, within a certain amount of time after the filing of a notice of default if the default is not cured, has the right to proceed to foreclose, by non-judicial sale or by judicial action, its interest in the real estate. Such an interest in the real estate, once foreclosed, would, most probably, provide the trustee the right to collect any rents from the property. See NEB. REV. STAT. § 76-1001 et seq. (1993 Supp.). It is this statutory right to foreclose by non-judicial means, coupled with the grant of an interest in the real estate by the execution and delivery of the Trust Deed which gives the trustee a potential interest in rents.

The Trust Deed in this case contains no language creating, providing, assigning or granting a security interest in rents to the trustee or the creditor. Therefore, the Court must conclude as a matter of law, that the claim of the creditor is secured only by a security interest in real property that is the debtor's principal residence. Pursuant to 11 U.S.C. § 1322(b)(2), the debtor is prohibited from modifying the rights of the holder of such a secured claim.

The proposed plan attempts to modify the claim of Beneficial which is secured only by a secured interest in real property that is the debtor's principal residence. Such a plan cannot be confirmed.

Installment Payment of a Matured Debt

Beneficial has asserted that not only is the plan an attempt to modify its claim which is prohibited by Section 1322(b)(2) but that the Code prohibits payment of a matured debt over time through the plan. Although Beneficial may have correctly stated the law at the time this issue was presented, the statute has recently been changed and such change may, but will not necessarily, affect the rights of both debtor and Beneficial. See 11 U.S.C. § 1322(c)(1) and (2) as codified pursuant to the Bankruptcy Reform Act of 1994 Amendments.

Conclusion

The plan proposed by the debtor is denied confirmation. The debtor is granted until March 1, 1995, to file an amended plan.

Separate journal entry shall be filed.

DATED: January 26, 1995

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
QUINN, CASEY 444-1616
RASMUSSEN, SCOTT 345-8853

Copies mailed by the Court to:
Kathleen Laughlin, Trustee

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
JOSET BLAKE,	)	CASE NO. BK94-80709
	)	A
DEBTOR(S)	)	
	)	CH. 13
	)	Filing No. 16, 22
Plaintiff(s)	)	
vs.	)	JOURNAL ENTRY
	)	
	)	
	)	DATE: January 26, 1995
Defendant(s)	)	HEARING DATE: August 15, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Amended Plan by Debtor; Resistance by Beneficial Nebraska, Inc.

APPEARANCES

Casey Quinn, Attorney for Debtor
Scott Rasmussen, Attorney for Beneficial Nebraska

IT IS ORDERED:

Plan is denied confirmation. Debtor is granted until March 1, 1995, to file an amended plan. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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