

In re Thomas-Wesby, 1990 WL 455311 (Bankr.S.D.Ga., Mar 30, 1990)  
(NO. 89-10291, 89-10586)

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>89-10291</u>
BELVA THOMAS-WESBY	)	
	)	
Debtor	)	
	)	
WILLIE LEE WESBY	)	Chapter 13 Case
	)	Number <u>89-10586</u>
Debtor	)	
	)	
KENNETH LAMOUREUX	)	
a/k/a KENNETH LAURMOUX	)	FILED
	)	at 4 O'clock & 59 min. P.M.
Movant	)	Date: 3-30-90
	)	
vs.	)	
	)	
BELVA THOMAS-WESBY	)	
WILLIE LEE WESBY	)	
AND SYLVIA FORD DRAYTON,	)	
CHAPTER 13 TRUSTEE	)	
	)	
Respondents	)	

**ORDER**

Movant, Kenneth R. Lamoureux, objected to confirmation of each debtor's plan contending that the plans had not been filed in good faith. In addition, movant objects to the treatment of his claim as unsecured under the plans. After considering the record, briefs, and arguments of counsel, the court makes the

following findings of fact and conclusions of law.

**FINDINGS OF FACT**

On February 1, 1989, debtors, Willie Lee Wesby and Belva Thomas-Wesby, executed a deed to secure debt to movant to secure an indebtedness owed by the debtors in the principal sum of Fourteen Thousand and No/100 (\$14,000.00) Dollars. The deed to secure debt granted movant a second priority security interest in the debtors' primary residence located in Richmond County, Georgia. The debt was to be repaid in equal monthly installments of Three Hundred Fifty and No/100 (\$350.00) Dollars per month commencing on March 1, 1989, and continuing until the loan was paid in full. The payment was to be allocated first to accrued interest at the annual rate of two (2%) percent above the prime rate and then to the principal sum. Shearson Lehman Hutton Mortgage Corporation (hereinafter referred to as "Shearson") held the first priority deed to secure debt on the residence. Shearson filed a proof of claim in Mr. Wesby's case in the principal sum of Fifty-Four Thousand Four Hundred Ninety-One and 33/100 (\$54,491.33) Dollars. Shearson failed to file a proof of claim in Mrs. Thomas-Wesby's case, but the debtor filed a proof of claim on their behalf for Fifty-Thousand and No/100 (\$50,000.00) Dollars. Shearson's claim in Mr. Wesby's case appears to reflect the accurate amount of the mortgage and is supported by Mr.

Wesby's testimony at the confirmation hearing.

On March 2, 1989, debtor, Belva Thomas-Wesby, filed for protection under Chapter 13 of the Bankruptcy Code proposing to pay

to the trustee the sum of One Hundred Fifty and No/100 (\$150.00) Dollars per month for a period of sixty months to pay all secured claims and court costs, with unsecured claims to be paid pro rata from the remaining funds paid to the trustee. At the confirmation hearing, the trustee estimated that the unsecured creditors will receive a dividend of 6.2 percent. The trustee's estimated dividend to unsecured creditors treats the claim of movant as fully secured.

Debtor, Willie Lee Wesby, filed for protection under Chapter 13 of the Bankruptcy Code on April 26, 1989, proposing to pay to the Chapter 13 trustee the sum of One Hundred Eighty-Five and No/100 (\$185.00) Dollars per month for a period of sixty months to pay all secured claims and court costs with unsecured claims to be paid pro rata from the remaining proceeds paid to the trustee. At the confirmation hearing the Chapter 13 trustee indicated that the plan as proposed would not pay secured claims and court costs. The trustee's estimate of payments treats the claim of movant as wholly secured.

Debtor, Mr. Wesby, has an interest in a 1980 Mack

tractor which he valued at Five and No/100 (\$5.00) Dollars in his schedules. Appraisals of the tractor submitted by Mr. Wesby after the confirmation hearing show the value of the tractor to be One Thousand Five Hundred and No/100 (\$1,500.00) Dollars without completing any of the necessary repairs, estimated at One Thousand Two Hundred Fifty and No/100 (\$1,250.00) Dollars. The debtor

testified at the confirmation hearing that the First National Bank of Atlanta (hereinafter referred to as "First Atlanta") held the title to the truck, but First Atlanta has filed only an unsecured claim in the debtor's case. ITT Financial Services filed a secured claim in Mr. Wesby's case listing as part of its collateral a 1980 Mack Tractor, but no title to the tractor is attached to the proof of claim. Movant testified at the confirmation hearing that in May, 1989, he had advanced Mr. Wesby the funds necessary to register the tractor for operation on the public highways, and the tractor had been generating income. Mr. Wesby testified that the tractor had been stripped down and was junk. Registration documents on the 1980 Mack tractor show that a replacement registration certificate was obtained for the tractor on August 3, 1989.

The debtors' residence has a value of Fifty-Six Thousand and No/100 (\$56,000.00) Dollars based on the testimony of the

debtors. The house was purchased in 1985 for Fifty-Two Thousand and No/100 (\$52,000.00) Dollars and appraised in 1988 at Fifty-Six Thousand and No/100 (\$56,000.00) Dollars by the Richmond County Tax Assessor. Movant's only evidence as to value is an insurance policy showing that the home was insured for up to Seventy-One Thousand and No/100 (\$71,000.00) Dollars. Mrs. Thomas-Wesby testified that the insurance premium is included in the monthly mortgage payment to the first mortgage holder and the amount of coverage increases yearly due to an automatic inflation rider on the policy. The debtors,

however, testified that because of changes in the neighborhood and a drain system which had been dug up in the yard, but not completed, the property had appreciated very little since it was purchased.

#### CONCLUSIONS OF LAW

Although a comprehensive definition of good faith is not practical, the basic inquiry should be whether under the circumstances of the case, the debtor has abused the provisions, purpose, or spirit of Chapter 13 in the proposed plan. Kitchens v. Georgia Railroad Bank & Trust Company, 702 F.2d 885 (11th Cir. 1983). The court in Kitchens basically sets forth thirteen (13) factors to be considered on the question of good faith:

1. The amount of the debtor's income from all sources;
  2. The living expenses of the debtor and his dependents;
  3. The amount of attorneys fees;
  4. The probable or expected duration of the debtor's Chapter 13 plan;
  5. The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
  6. The debtor's degree of effort;
  7. The debtor's ability to earn and the likelihood of fluctuation in his earnings;
  8. Special circumstances such as inordinate medical expenses;
  9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
  10. The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack or same, in dealing with his creditors;
  11. The burden which the plan's administration would place upon the trustee;
  12. The substantiality of repayments; and
  13. The potential nondischargeability of debt in a Chapter 7 proceeding.
- Kitchens v. Georgia Railroad Bank & Trust Company, 702 F.2d 885,

(11th Cir. 1983).

The debtor has the burden of proof to establish that a Chapter 13 plan has been proposed in good faith. In re: Smith, 39 B.R. 57 (Bankr. S.D. Fla. 1984); In re: Belt, 106 B.R. 553 (Bankr. N.D. Ind. 1989). Once that initial showing has been made by the debtor, the burden of going forward shifts to the objector to show that the plan was not proposed in good faith. In re: Belt, supra. The debtor met that burden at the confirmation hearing, but the movant has failed to demonstrate that the plans were not filed in good faith.

At the hearing, movant relied upon the alleged omission

of the 1980 Mack tractor from the schedules of the debtors to demonstrate a lack of good faith. The tractor, however, was included in Mr. Wesby's schedules, even though it now appears that the value of the tractor was understated. The tractor is also revealed in Mrs. Thomas-Wesby's schedules. The low value placed on the tractor by the debtors is not sufficient to find that these Chapter 13 plans were not filed in good faith. Under the circumstances of this case the fact that the debtors valued the tractor as junk when in fact it had a value of One Thousand Five Hundred and No/100 (\$1,500.00) Dollars, but also required the expenditure of One Thousand Two Hundred Fifty and No/100 (\$1,250.00) Dollars for necessary repairs, is not sufficient for this court to reach a determination under a Kitchens analysis that the debtors'

plans abuse the provisions, purpose or spirit of Chapter 13. The debtors' plans appear to have been proposed in good faith.<sup>1</sup> In their plans, the debtors propose to value the movant's collateral, their primary residence, and allow the movant's claim

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<sup>1</sup>In spite of the time frame in which the debtors incurred their debt with him and filed for relief, movant has not contended a debtor's lack of bona fides in dealing with him as a basis for a bad faith determination and denial of confirmation. Additionally, now it appears to have abandoned the good faith objection to confirmation as it was not argued in his brief submitted after the hearing.

to be secured to the extent Of that value. The balance owed on the debt due movant would be treated as an unsecured claim, and the movant's lien on the residence would be avoided to the extent of the unsecured claim. Movant contends that such a valuation, is an impermissible modification of a claim secured only by a security interest in the debtors' primary residence. Pursuant to 11 U.S.C. §506(a),<sup>2</sup> a creditors allowed claim is an unsecured claim to the extent that the value of such creditor's interest in the collateral is less than the amount Of the allowed claim. To the extent that a lien secures a claim that is

not an allowed secured claim, the lien may be avoided by the debtor. 11 U.S.C. § 506(d).<sup>3</sup> Therefore, if a creditor's claim

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<sup>2</sup>11 U.S.C. § 506(a) provides in relevant part:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . , is a secured claim to the extent of the value Of such creditor's interest in the estate's interest in such property is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount Of such allowed claim.

<sup>3</sup>11 U.S.C. §506(d) provides:

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void

exceeds the value of the creditor's collateral, the claim is only secured to the extent of the value of the collateral. See United States v. Ron Pair Enterprises, \_\_\_\_ U.S. \_\_\_\_, 109 S.Ct. 1026, 103 L.E.2d 290 (1989). The balance of the claim then may be allowed as an unsecured claim. Id. Section 506 is used to determine the secured status of claims in all cases filed under Title 11 of the United States Code. 11 U.S.C. §103(a).<sup>4</sup> The provisions of Chapter 13 of the Bankruptcy Code, prohibit a Chapter 13 plan from modifying the rights of a holder of a secured claim secured only by a security interest in real property

that is the debtor's principal residence. 11 U.S.C. §1322(b)(2).<sup>5</sup>

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unless -

- (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
- (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

<sup>4</sup>11 U.S.C. §103(a) provides:

Except as provided in section 1161 of this title, Chapter 1, 3, and 5 of this title apply in a case under Chapter 7, 11, 12 or 13 of this

<sup>5</sup>11 U.S.C. §1322(b)(2) provides:

The movant contends that this provision precludes the application of section 506 to secured claims secured only by a security interest in the debtor's principal residence. Some courts have found such a position persuasive and have held that section 1322 precludes modification of a lender's rights when the lender is secured only by an interest in the debtor's principal residence. See, e.g., In re: Russell, 93 B.R. 703 (D.N.D. 1988); In re: Brown, 91 B.R. 19 (Bankr. E.D. Va. 1988).

The debtors contend that the meaning of "secured claim" used in section 1322(b)(2) must be determined by applying section 506(a). The legislative history is sparse at best with regard to the enactment of section 1322(b)(2) and provides little guidance as to congressional intent.<sup>6</sup> After a careful reading of these provisions, this court concludes that the use of the words "secured

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(b) Subject to subsections (a) and (c) of this section, the plan may -  
(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

<sup>6</sup>For a detailed discussion of the legislative history of 11 U.S.C. §1322(b)(2), see In re: Neal, 10 B.R. 535 (Bankr. S.D. Ohio 1981). See also In re: Simmons, 78 B.R. 300 (Bankr. D. Kan. 1987).

claims" in the prohibition of section 1322(b)(2) retains the same meaning as "secured claims" in other portions of the Bankruptcy Code. Section 506(a) defines what constitutes a secured claim, and that same definition must be applied when reading section 1322(b)(2). From the language of section 1322(b)(2), it is apparent that only the secured portion of a creditors claim is protected from modification by a Chapter 13 plan.<sup>7</sup> See Houglan v. Lomas and Nettleton Company (In re: Houglan), 886 F.2d 1182 (9th Cir. 1989); Wilson v. Commonwealth Mortgage Corporation, 895 F.2d 123 (3rd Cir. 1990). The "other than" claims clause of section 1322(b)(2) "follows the secured claim portion of the sentence and precedes the unsecured claim portion. Certainly it refers to what preceded it, and indicates that a secured residential real estate claim will have special protection." Houglan, supra. "[Section] 1322(b)(2) does not preclude the

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<sup>7</sup>Binding precedent in this circuit has held that section 506(b) does not provide a secured creditor secured only by an interest in the debtor's residence with interest on prepetition arrearages unless the contract between the debtor and creditor provides for such interest. Foster Mortgage Corporation v. Terry (In re: Terry), 780 F.2d 894 (11th Cir. 1985). The court in Terry reasoned that the application of section 506(b) to prepetition arrearages due on claims of oversecured creditors constituted an impermissible modification of the claim of a secured creditor secured only by a security interest in debtor's residence given the prohibition of section 1322(b)(2). The Eleventh Circuit Court of Appeals in Terry did not address the application of section 506(a) because the creditors were all oversecured. Therefore, the full amount of each creditor's claim at issue in Terry constituted a secured claim which could not be modified by a Chapter 13 plan.

modification of any 'unsecured' portion of an

undersecured claim." Wilson, supra.

Having determined that the "unsecured" portion of an undersecured claim may be modified by a Chapter 13 plan, the court must determine what portion of movant's claim is unsecured. The debtors contend that the first mortgage on their residence exceeds its value and that all of the movant's claim should be unsecured. Their Chapter 13 plans propose to treat movant's claim as unsecured. Having determined the value of the residence to be Fifty-Six Thousand and No/100 (\$56,000.00) Dollars and the amount of the first mortgage to be Fifty-Four Thousand Four Hundred Ninety-One and 33/100 (\$54,491.33) Dollars, movant holds a secured claim to the extent of the difference between the value of the residence and the amount of the first mortgage, One Thousand Five Hundred Eight and 67/100 (\$1,508.67) Dollars. See 11 U.S.C. §506(a). See also Wilson, supra; Houghton, supra; Ron Pair Enterprises, supra. Movant, therefore, has an allowed secured claim in the principal sum of One Thousand Five Hundred Eight and 67/100 (\$1,508.67) Dollars, and an allowed unsecured claim in the principal sum of Twelve Thousand Four Hundred Ninety-One and 33/100 (\$12,491.33) Dollars.

The circuit courts which have addressed this issue have not addressed how the secured portion of a claim that has been

bifurcated is to be paid. Given the language of section 1322(b)(2), only one payment method would be acceptable. The debtor must continue to make the monthly payment plus interest at the rate

provided in the note to movant until the secured portion of the claim plus interest has been paid in full. In re: Hayes, No. 388-00187-H13 (Bankr. D. Or. March 13, 1990). "[A]ltering the monthly payment or other term must be considered a modification which is impermissible when dealing with a creditor secured solely by the principal residence. If a cram-down were not treated as a modification, then the 'special protection' language of §1322(b)(2) provided for claims secured by the residence would be superfluous and could be stricken from 1322(b)(2)." In re: Hayes. supra. The debtors, therefore, must provide for payments to the movant of Three Hundred Fifty and No/100 (\$350.00) Dollars per month which must first be applied to accrued interest at the annual rate of two (2%) percent above prime rate as provided for in the agreement between movant and debtors on the secured claim until the allowed secured claim of One Thousand Five Hundred Eight and 67/100 (\$1,508.67) Dollars has been paid in full. The unsecured portion of the claim may be modified under the debtors' Chapter 13 plans.

As the debtors' plans propose to treat the entire claim of movant as unsecured which is impermissible under the provisions

of section 506 and section 1322(b)(2), confirmation must be denied.

It is therefore ORDERED that confirmation of these Chapter 13 plans is denied;

Further ORDERED that the claim of movant, Kenneth R. Lamoureux, be bifurcated into an unsecured claim of Twelve Thousand

Four Hundred Ninety-One and 33/100 (\$12,491.33) dollars and a secured claim of One Thousand Five Hundred Eight and 67/100 (\$1,508.67) Dollars which secured claim may not be modified under the debtors' Chapter 13 plans.

Further ORDERED that within fifteen (15) days of the date of this order debtors shall file with this court a modified Chapter 13 plan proposing treatment of movant's claim in accordance with the terms of this order or pursuant to 11 U.S.C. §105 the debtors' cases shall be dismissed without further notice or hearing.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 30th day of March, 1990.