

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>91-10369</u>
LAWRENCE NICHOLAS SQUITTIORI)	
)	
Debtor)	
_____))	
VANDERBILT MORTGAGE &)	FILED
FINANCE, INC.)	at 9 O'clock & 14 min. P.M.
)	Date: 9-17-91
Movant)	
)	
vs.)	
)	
LAWRENCE NICHOLAS SQUITTIORI)	
)	
Respondent)	

ORDER

Vanderbilt Mortgage & Finance, Inc. ("Vanderbilt") by motion seeks, in the alternative, conversion of this case to a case under Chapter 7, dismissal or relief from the automatic stay of 11 U.S.C. §362(a) in order to foreclose a security interest in one (1) 1988 Clayton manufactured home, Charleston model, i.d. # CLHN1744NC upon which the debtor claims an interest. Based on the evidence presented at hearing and consideration of relevant authorities, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The debtor, Lawrence Nicholas Squittiori, and Emily R. Breuning ("Ms.

Breuning")¹ were married on July 29, 1988. On June 16, 1988, Ms. Breuning purchased the mobile home in question from Austin Homes ("Austin") for Twenty-One Thousand Two Hundred Nine and 75/100 (\$21,209.75) Dollars. Austin received Thirteen Thousand Two Hundred Nine and 75/100 (\$13,209.75) Dollars as a down payment on the purchase. The debtor made the down payment. Although the debtor made the down payment, all of the documentation admitted into evidence relative to the purchase, other than two receipts which reflect the total down payment, indicates Ms. Breuning was the sole purchaser of the mobile home.² The remaining Eight Thousand and No/100 (\$8,000.00) Dollars of the purchase price was financed pursuant to a retail installment sale contract ("the installment agreement"). The terms of the installment agreement called for amortization of the amount financed over 84 months at an interest rate of 12.99% per annum. The installment agreement requires a monthly payment of One Hundred Forty-Five and 49/100 (\$145.49) Dollars, beginning August 1, 1988.

The installment agreement grants the seller, Austin, a security interest in the mobile home. Austin assigned the installment agreement and its security interest in the mobile home to Vanderbilt.

On July 30, 1990, debtor and Ms. Breuning executed a separation agreement which transferred ownership of the mobile home to debtor. The separation agreement provides: "The husband shall become the sole owner of the mobile home owned by the parties _ securing a purchase money loan from Vanderbilt Mortgage Company" (see exhibit "D-1," para. 8.c., at p. 3) and "the wife . . . shall be responsible for the following debts of the parties: the mobile home loan from Vanderbilt Mortgage Company; approximate balance \$6,200.00" (see exhibit "D-1," para. 7, at p. 2). During the summer months of 1990, Ms. Breuning fell behind on her monthly payments.³ Vanderbilt initiated collection efforts and between

¹Ms. Breuning also uses the name "Emily R. Pike." Documents admitted into evidence used both names.

²See exhibits "M-1"- "M-11."

³Vanderbilt last received a payment from Ms. Breuning on September 10, 1990.

December 12 and 14, 1990 repossessed the mobile home.

On December 5, 1990, approximately one week before the repossession, Ms. Breuning filed for relief under Chapter 13, title 11 United States Code. Her schedule of assets included the mobile home and showed her as sole owner. Debtor testified at hearing that he funded Ms. Breuning's Chapter 13 plan. On February 28, 1991 Ms. Breuning's bankruptcy case was dismissed for failure to prosecute.

On February 26, 1991, two days before the dismissal of Ms. Breuning's case, debtor filed his petition for relief pursuant

to Chapter 13 Debtor's petition schedules the mobile home as an asset and lists debtor as sole owner. The debtor's petition reflects debt secured by the mobile home of Five Thousand Two Hundred and No/100 (\$5,200.00) Dollars. There is no other secured debt listed in debtor's schedules. Total unsecured debt reflected in the petition is Three Thousand Eight Hundred Sixty-Five and No/100 (\$3,865.00) Dollars.

Debtor's proposed Chapter 13 plan provides that Vanderbilt, the only listed secured creditor, is to be paid in full through payments to the trustee. Debtor's proposed plan requires the debtor to make monthly payments of Eighty-Six and 67/100 (\$86.67) Dollars to the trustee until all allowed claims are paid in full. The plan is currently funded through salary deductions by the debtor's employer, Race Trac Petroleum, Inc., where debtor works as a "shift manager." Debtor's petition indicates that he was unemployed during the entire year preceding his bankruptcy filing. His current scheduled income is Seven Hundred and No/100 (\$700.00) Dollars monthly. Debtor testified that he intends to seek a higher paying job. The debtor's budget reflects a meager living expense of Six Hundred Eighteen and No/100 (\$618.00) Dollars per month. As the debtor proposes to pay for the mobile home through disbursements from the trustee, the monthly living expense lists no housing expenses. The budget shows debtor's current disposable income available for plan payments is Eighty-Two and No/100 (\$82.00)

Dollars per month.

Vanderbilt timely filed a proof of claim showing a secured claim with a net balance of Seven Thousand Eight Hundred Forty and 88/100 (\$7,840.88) Dollars and arrearages on the installment agreement, as of June 25, 1991, of Eight Hundred Thirty-Seven and 80/100 (\$837.80) Dollars. The proof of claim values the mobile home at Eleven Thousand Nine Hundred and No/100 (\$11,900.00) Dollars. Debtor did not object to Vanderbilt's proof of claim.

CONCLUSIONS OF LAW

Conversion or dismissal of a Chapter 13 case is governed by 11 U.S.C. §1307(c). The court has discretion to convert a Chapter 13 case to a Chapter 7 case, or alternatively, to dismiss the case for cause, whichever is in the best interests of creditors, on request of a party in interest,⁴ after notice and hearing. The enumerated "for cause" grounds in subsection (c)(1)-(10)⁵ of §1307

⁴Austin repurchased the defaulted installment agreement in compliance with the dealer repurchase agreement set out in the terms of the installment agreement (see exhibit "M-1"). At hearing, counsel for the debtor raised the issue of Vanderbilt's standing to prosecute its motions in light of the fact that Vanderbilt has been paid in full for the installment agreement. Vanderbilt's proof of claim remains unobjected to, is deemed allowed, 11 U.S.C. §502(a); and therefore Vanderbilt is a party in interest under §1307(c).

⁵Grounds under 11 U.S.C. §1307(c) are

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees and charges required under Chapter 123 of title 28;
- (3) failure to file a plan timely under section 1321 of this title;
- (4) failure to commence making timely payments under section 1326 of this title;
- (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) material default by the debtor with respect to a term of a confirmed plan;
- (7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under

are not all inclusive. 5 Collier on Bankruptcy, ¶1307.01[4], 1307-9 (L. King 15th ed. 1991). E.g., Matter of Vlahakis, 11 B.R. 751 (Bankr. M.D. Ga. 1981); In re: Roderick, 20 B.R. 485 (Bankr. D. R.I. 1982). In addition to the applicability of 1307(c)'s enumerated "for cause" grounds, the court may determine that other factors in the case support a finding of "cause." See In re: Martin-Trigona, 35 B.R. 596, 601 (Bankr. S.D. N.Y. 1983). As movant, Vanderbilt bears the burden of proof to establish a "cause" for either dismissal or conversion. GMAC v. Bullock (In re: Bullock),

Ch. 13 Case No. 89-11537 (Bankr. S.D. Ga. Dalis, J. April 4, 1990).

Vanderbilt argues four separate "for cause" grounds to convert or dismiss this Chapter 13 case: 1) that debtor's petition was filed in bad faith (based on its allegation that debtor holds no ownership interest in the mobile home), 2) that debtor's bankruptcy case in conjunction with Ms. Breuning's previous bankruptcy has caused unreasonable delay which is prejudicial to creditors, 3) that debtor cannot comply with his proposed Chapter 13 plan and 4) that debtor's plan does not comply with 11 U.S.C. §1322(b)(2) and debtor is incapable of funding a plan which would comply with §1322(b)(2).

The debtor cannot comply with his proposed plan and cannot propose a

section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;

(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; or

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521.

confirmable plan. Section 1322(b) provides that the contents of the Chapter 13 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.

11 U.S.C. §1322(b)(2).

Vanderbilt contends its rights impermissibly are modified by debtor's plan. Vanderbilt reasons that its rights cannot be modified because its claim is secured by real property that is debtor's principal residence. "Real property" under §1322(b)(2), however, does not encompass a mobile home. See In re: Washington,

837 F.2d 455, 456-57 (11th Cir. 1988). The mobile home was removed twice: first by debtor and Ms. Breuning; again by Vanderbilt during the repossession. Moreover, the installment agreement provided "that if the Manufactured Home is personal property I [the purchaser] will not let it become part of any real estate." The Bankruptcy Code is clear and state law is clear. A mobile home is not real property and this mobile home has not lost its "mobile" character. The proscription on modification in 1322(b)(2) does not apply to Vanderbilt. Because Vanderbilt is not protected under §1322(b)(2), the debtor may modify Vanderbilt's rights.

Debtor's proposed plan provides for a monthly payment of Eighty-Six and 67/100 (\$86.67) Dollars to the trustee. The installment agreement requires a monthly payment of One Hundred Forty-Five and 49/100 (\$145.49) Dollars. Debtor's proposed plan modifies Vanderbilt's secured claim by varying the amount of the monthly payments required under the original installment agreement. See In re: Wilkinson, 33 B.R. 933, 935 (Bankr. S.D. N.Y. 1983). Although debtor may modify Vanderbilt's rights, the plan provides to pay the allowed secured claim of Seven Thousand Eight Hundred Forty and 88/100 (\$7,840.88) Dollars in full from

disbursements of the trustee. Section 1322(c) provides that "[t]he plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." Debtor's

proposed plan does not specify the number of months to complete the plan but proposes to pay all claims in full. However, even if the court determines there is cause under §1322(c) to approve a five-year plan, the debtor's proposed plan payments will not pay out the Vanderbilt secured claim by the end of the plan. Assuming the debtor can make the Eighty-Six and 67/100 (\$86.67) Dollars proposed per month payment for the next five years, which is a tenuous assumption based on debtor's petition,⁶ the debtor will have paid a total of Five Thousand Two Hundred and 02/100 (\$5,200.02) Dollars to the trustee at the end of five years. This is insufficient to pay Vanderbilt's timely filed, unobjected to proof of claim. In addition to Vanderbilt's secured claim, unsecured creditors in this case filed unobjected to proofs of claim totaling Eight Hundred Ninety-Three and 07/100 (\$893.07) Dollars. The debtor's petition reflects unsecured debt totaling Three Thousand Eight Hundred Sixty-Five and No/100 (\$3,865.00) Dollars. The debtor's pay in is insufficient to fund a plan to pay secured claims much less pay unsecured creditors. Based on the payments to the trustee, the claim of Vanderbilt will not be paid in full as proposed under the plan. Vanderbilt is an oversecured creditor; that is, the amount of the allowed secured claim is less than the value of the

collateral securing the claim, 11 U.S.C. §506(b), and as such must be paid in full

⁶The debtor's petition reflects disposable income of Eighty-Two and No/100 (\$82.00) Dollars per month. The debtor proposes nonetheless to squeeze out Eighty-Six and 67/100 (\$86.67) Dollars each month to the trustee in order to fund the plan.

if the plan provides for the claim. 11 U.S.C. §1325(a)(5)(B)(i)(ii).

As the last payment due on the debt that is the basis for the allowed secured claim of Vanderbilt may be due after the date on which the final payment under the plan is due, pursuant to 11 U.S.C. §1322(b)(5), the debtor could propose a plan to cure the default within a reasonable time and maintain regular monthly payments directly to Vanderbilt while the case is pending.⁷ However, in this case a plan proposing to deal with the claim of Vanderbilt under §1322(b)(5) is not feasible due to lack of adequate income by the debtor. The debtor must have sufficient income to maintain the monthly payments required under the installment agreement, as well as cure any outstanding prepetition payment arrearage within the plan period. For the same reason that debtor cannot formulate a feasible plan which would comply with §1322(b)(2), debtor cannot comply with §1322(b)(5). The debtor's petition and the evidence presented at hearing make it abundantly clear that debtor lacks adequate income to pay Vanderbilt One

Hundred Forty-Five and 49/100 (\$145.49) Dollars per month required under the installment agreement and meet his other monthly living expenses.⁸

The debtor lacks sufficient income to comply with a confirmable plan; therefore, any confirmable plan would not be feasible. 11 U.S.C. §1325(a)(6).

⁷The debtor could propose a plan to cure the prepetition arrearages due Vanderbilt of \$837.80, pay allowed unsecured claims totalling \$893.07, attorneys fees of \$750.00 and filing fees of \$120.00 with regular monthly payments due Vanderbilt to be paid direct as they come due in the amount of \$145.49 per month. Depending on the amount of the monthly payment to the trustee, the plan could be paid out before the final payment comes due to Vanderbilt under the installment agreement on July 1, 1995.

⁸The budget expenses of \$618.00 per month plus Vanderbilt's payment of \$145.49 equals \$763.49 per month with-only \$700.00 per month in available income.

Debtor can neither maintain the payment required by the installment agreement nor pay Vanderbilt's claim in full in accordance with §506(b) and §1322(b)(2). Debtor's inability to comply with one of the two alternative treatments available for dealing with this claim evidences a lack of feasibility for confirmation. Cf. In re: Cole, 122 B.R. 943, 951 (Bankr. E.D. Pa. 1991). There was no evidence at hearing that debtor's income is likely to increase during the plan period, other than a mere promise to look for a better paying job. I find that debtor's inability to propose a confirmable plan is "cause" under §1307(c) for conversion of debtor's Chapter 13 plan to a Chapter 7 case or dismissal. In light of possible equity in the mobile home to pay on unsecured claims, it is in the best interests of creditors that this case be converted to a Chapter 7 liquidation, rather than dismissed. Cf. In re: Walters, 11 B.R. 567 (Bankr. S.D. W.Va. 1981).

Remaining for resolution is Vanderbilt's motion for relief from stay.

Section 362(a) provides for an automatic stay against actions taken against property of the estate. However, §362(d) provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
- (2) with respect to a stay of an act against property under subsection (a) of this section,
 - (A) the debtor does not have an equity in such property
 - (B) such property is not necessary to an effective reorganization.

11 U.S.C. §362(d).

Vanderbilt bears the burden of proof on the issue of debtor's equity in the mobile home and debtor bears the burden of proof as to all other issues. 11 U.S.C. §362(g).

Vanderbilt's proof of claim and evidence presented at

hearing establish there is equity in the mobile home.⁹ The conjunctive grounds for relief from stay under §362(d)(2) require that the creditor moving for relief show the debtor does not have

equity in the property. 11 U.S.C. §362(d)(2)(A). As there is equity in the mobile home, grounds for relief from stay under 362(d)(2) have not been established. Under §362(d)(1), the debtor bears the burden to prove that a for cause basis for relief from stay does not exist. This proof must include a showing that the interest of Vanderbilt is adequately protected. An equity cushion¹⁰ is considered the classic form of adequate protection. In re: Mellor 734 F.2d 1396, 1400 (9th Cir. 1984); Curtis v. Delaware Val. S.& L. Ass'n., 9 B.R. 110, 112 (Bankr. E.D. Pa. 1981); In re: San Clemente Estates, 5 B.R. 605, 610 (Bankr. S.D. Calif. 1980). In this case an equity cushion exists and Vanderbilt is in possession of the mobile home, so the possibility that the collateral will deteriorate in value due to vandalism, abuse, neglect or even normal wear and tear is removed. The case is converted to a Chapter 7 proceeding and the interest of the estate either will be abandoned by the trustee or liquidated along with the interest of Vanderbilt through sale, proceeds of which will satisfy Vanderbilt's secured claim. Presently the interest of Vanderbilt is adequately protected and finding no other potential for cause basis for relief from stay,

⁹Vanderbilt's proof of claim reflects debt secured by the mobile home of \$7,840.88 and a fair market value of the mobile home of \$11,900.00.

¹⁰"Equity cushion" is the "value in the property above the amount owed to [the creditor] that will shield [the creditor's] interest from loss due to any decrease in the value of the property during the time the automatic stay remains in effect." In re: Roane, 8 B.R. 997, 1000 (Bankr. E;D. Pa. 1981).

it is ORDERED that Vanderbilt's motion for relief from stay is denied;
further ORDERED that this case is converted to a case under Chapter 7;

This case having been converted, debtor is hereby ORDERED to file a
Statement of Affairs, Schedules, Summary Sheet, and Statement of Intentions
within fifteen (15) days of this order. If not filed by the date indicated, or
request for hearing filed, the case shall be referred to the United States Trustee
for appropriate action.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 17th day of September, 1991.