

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>91-12289</u>
LUANN F. CRANE)	
)	
Debtor)	
_____)	
)	
GENERAL ELECTRIC CAPITAL)	FILED
CORPORATION, servicing agent)	at 9 O'clock & 00 min. A.M.
for the GOVERNMENT NATIONAL)	Date: 9-22-93
MORTGAGE ASSOCIATION,)	
)	
Movant)	
)	
vs.)	
)	
LUANN F. CRANE,)	
)	
Respondent)	

ORDER

By motion General Electric Credit Corporation ("General Electric") seeks relief from the stay of 11 U.S.C. § 362(a) in order to foreclose its security interest in a mobile home. Having heard the evidence and having considered the applicable authorities, I find that the grant of relief from stay is appropriate.

FINDINGS OF FACT

On July 27, 1984 Melissa and Michael Vitek entered into an agreement to purchase and finance a 1984 Vintage Walton manufactured

home, I.D. number 0642 (the "mobile home") from Colonial Mobile Homes. As a part of the transaction Colonial Mobile Homes retained a security interest in the mobile home. It subsequently assigned the agreement and security interest to Southern Guaranty Corporation who, in turn, transferred the same to Government National Mortgage Association. On June 4, 1986 James and Ann Kelly executed an assumption agreement for the purchase of the mobile home in favor of Southern Guaranty Corporation. The assumption agreement provided that an unpaid balance of \$38,454.04 would be paid in 158 installments of \$243.38. On May 7, 1987, Mr. and Mrs. Kelly sold the mobile home to Luann and George Crane. The contract provided for an \$800.00 equity with owner financing and payments of \$250.00 per month to be made to Mr. and Mrs. Kelly for 144 months. The contract also lists the first mortgage holder as Home Owners Funding Corporation ("Home Owners"), the servicing agent for Government National Mortgage Association on the account at that time. The contract did not provide for the assumption of the debt due Government National Mortgage Association.

In early 1991 debtor started making direct payments to Home Owners. In May, 1991 debtor received notice that Account Number 3126521, which was listed in the name of Mr. and Mrs. Kelly and on which debtor had been making payments, was past due. A second notice of delinquency, apparently due to unpaid insurance charges, was sent in November 1991. Debtor filed her chapter 13

petition on December 6, 1991. General Electric assumed the servicing on the account from Home Owners for Government National Mortgage Association on January 1, 1992.

Home Owners received notice of the debtor's filing and proposed plan on December 31, 1991 and General Electric received notice of this case on January 9, 1992. Neither General Electric nor debtor filed a proof of claim for the debt due Government National Mortgage Association secured by the mobile home. Paragraph 2(b) of debtor's plan provides:

Secured creditors shall retain liens securing their claims. Creditors who file claims and whose claims are allowed as secured claims shall be paid the lesser of (1) the amount of their claim; or (2) the value of their collateral as set forth here:

Homeowner's Funding Corp., as agent for the Government National Mortgage Association will be paid the value of the mobile home of \$4,000.00 (Account Number 3126521), together with interest at 8% by the Trustee.
(emphasis original).

Debtor's chapter 13 plan was confirmed on April 23, 1992. On October 1, 1992 General Electric instituted the present motion for relief from the stay in order to foreclose on the mobile home. Final hearing was continued from November 17, 1992 at General Electric's request in order to complete discovery.

CONCLUSIONS OF LAW

In support of its motion for relief, General Electric argues that it is not a creditor of the debtor, that the debtor's

plan does not provide for its debt, and that it is not bound by the order of confirmation and barred from seeking relief from the § 362 stay. According to General Electric, relief should be granted under 11 U.S.C. § 362(d)(1)¹ on a "for cause" basis either because it is not a creditor of the debtor or because it is not provided for in the plan and is not adequately protected.

General Electric contends that it does not have a claim against the debtor because it is not a creditor of the debtor there being no privity of contract between General Electric and debtor. Although debtor entered into a contract to purchase the mobile home from the Kellys, she never agreed to be personally liable for the debt due Government National Mortgage Association. In addition, the retail installment sales contract assumed by the Kellys specifically provides that the buyer "will not . . . transfer any interest therein [the mobile home] without express written consent of you [Southern Guaranty Corp.] or your assigns [Government National Mortgage Association]." No consent to the transfer of the mobile

¹11 U.S.C. § 362(d)(1) provides in pertinent part:

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.

home to debtor was ever sought or obtained.

Debtor argues that General Electric is her creditor because the United States Supreme Court in Johnson v. Home State Bank, 111 S.Ct. 2150 (1991) decided that parties in General Electric's position had "claims" against the debtor.

The issue in this case is whether a debtor can include a mortgage lien in a chapter 13 bankruptcy reorganization plan once the personal obligation secured by the mortgaged property has been discharged in a chapter 7 proceeding. We hold that the mortgage lien in such a circumstance remains a "claim" against the debtor that can be rescheduled under chapter 13.

Id. at 2152. One of the Court's rationales for holding that the claim against the debtor's property was also a claim against the debtor was that the creditor retained a "right to payment" from the proceeds of the sale of that property. Id. at 2154.

In this case, debtor argues that she did buy the property subject to the debt, even if she did not assume the debt. Accordingly, she contends her situation is analogous to that in Johnson where the personal liability of the debtor had been discharged in a chapter 7, but where the lien against the debtor's property remained. I do not find the situations totally analogous. In Johnson the debtor was in privity of contract with the creditor and had title to the property prior to his personal liability being discharged. In this case, debtor never was in privity of contract with any holder of the note or security agreement.

However, debtor does have an ownership interest in the mobile home by virtue of her contract with the Kellys. A debtor's interest in property is determined by state law. See Butner v. United States, 440 U.S. 48, 54-55, 99 S.Ct. 914, 918 (1979). Under Georgia law, ownership rights in a mobile home may be proved by issuance of a certificate of title for the vehicle or by other evidence establishing ownership. O.C.G.A. § 40-3-20; Rome Bank & Trust Co. v. Bradshaw, 143 Ga. App. 152, 237 S.E.2d 612 (1977). Although the evidence shows that a certificate of title was issued in the names of James and Ann Kelly with Southern Guaranty Corporation as first lienholder, the contract of sale between debtor and the Kellys is sufficient evidence to establish an ownership interest in the property. Because debtor's ownership interest can be affected by a sale of the property, under the rationale of Johnson General Electric is a creditor of the debtor. Accordingly, there is no lack of a debtor-creditor relationship between the parties which would provide a "for cause" basis for relief from stay under 11 U.S.C. § 362(d) (1).

Although General Electric is a creditor of the debtor, relief from the stay is still appropriate under 11 U.S.C. § 362(d) (1) because General Electric's interest in the property is not provided for in the plan and its interest in the property is not adequately protected. Debtor contends that General Electric is provided for in the confirmed plan, is bound by the terms of that

plan, and that relief from the automatic stay is available to General Electric only if there has been a material failure by the debtor to comply with the terms of the plan.

Debtor relies on 11 U.S.C. § 1327(a) which provides:

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

However, by its very terms § 1327(a) binds creditors only to "the provisions of a confirmed plan".

Upon becoming final, the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities as ordained by the plan. . . . The binding effect of the confirmation order establishes the rights of the debtor and creditors as those which are provided in the plan. (emphasis added).

5 Collier on Bankruptcy ¶ 1327.01[1] (15th ed. 1993)

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In this case, debtor's confirmed plan does not address the debt due General Electric. Paragraph 2(b) of debtor's plan expressly provides that:

[c]reditors who file claims and whose claims are allowed as secured claims will be paid . .

.

Although debtor sought to value General Electric's claim and pay it under the plan, by its very terms the plan applies only to those creditors who file claims. General Electric never filed a claim in

this case, nor was it required to. 11 U.S.C. § 501(a). If a creditor does not timely file a claim, the debtor is entitled to file a proof of that creditor's claim. 11 U.S.C. § 501(c). Secured creditors need not file a claim in bankruptcy but may look to their lien to satisfy the debt. Long v. Bullard, 117 U.S. 617, 6 S.Ct. 917 (1886). See also In re Thomas, 883 F.2d 991, 996 (11th Cir. 1989), cert. denied, Thomas v. Southtrust Bank of Alabama, 497 U.S. 1007, 110 S.Ct 3425 (1990). This rule is codified in 11 U.S.C. § 506(d)(2) which provides in pertinent part:

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

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of claim under section 501 of this title.

Debtor would have me find that General Electric is bound to her valuation and treatment of its "claim" despite no proof of claim being filed by asserting that General Electric is "provided for" in the plan, when the plan specifically provides only for valuation and payment of filed and allowed claims, when General Electric did not and need not have filed a claim, and when the debtor had the opportunity to file such claim for General Electric and failed to do so. Both the plain language of the plan and the equities of the case mitigate against such a finding. To concede to debtor's argument effectively would contravene the claim allowance and valuation procedures provided for by the Bankruptcy Code. Under

those procedures, there can be no valuation of a claim without a proof of claim first being filed and allowed. 11 U.S.C. §§ 501, 502. Accordingly, I find that in order to effectuate the provision of debtor's plan, the plan first requires the filing and allowance of a proof of claim before any valuation of the collateral securing the claim can be made. As no proof of claim was ever filed for the debt due General Electric, the plan's valuation provision does not "provide for" any interest of General Electric in property of the debtor. Therefore, the res judicata effect of the order of confirmation does not limit General Electric to the debtor's material failure to comply with the plan as the only valid cause for relief from stay.²

Under 362(d)(1), see note 1 supra, once the movant has established prima facie that there is cause for relief from stay, debtor, the party opposing relief, bears the ultimate burden of

²In the usual case the debtor's plan provisions would bind an undersecured creditor like General Electric as to any possible deficiency claim against the debtor. Unlike secured creditors, unsecured creditors in a chapter 13 case must file a proof of claim in order for their claim to be allowed and to participate in any distribution in the case. Bankruptcy Rules 3002(a), 3021; 11 U.S.C. § 1325. When no claim is filed for an undersecured creditor it forfeits any unsecured deficiency balance claim that it might have against the debtor. In re Bradshaw, 65 B.R. 556, 558 (Bankr. M.D.N.C. 1986). In this case, however, as debtor never assumed any personal liability on the debt, General Electric never had any right to seek a deficiency claim against debtor which would be subject to forfeiture. General Electric may have, under its security instruments, the right to recover any deficiency upon foreclosure from either the Vitek or the Kellys.

proof by a preponderance of the evidence that such cause does not exist. In re Pioneer Commercial Funding Corp., 114 B.R. 45, 47 (Bankr. S.D.N.Y. 1990). In this case, General Electric has shown that debtor's plan does not provide for its debt. I find this is sufficient to satisfy the creditor's burden of persuasion that its interest in the mobile home is not adequately protected. See In re Sacerdote, 74 B.R. 487, 491 n.8 (Bankr. E.D. Pa. 1987).

Debtor contends that General Electric is adequately protected because it has provided for a payment of \$4,000.00 at 8% interest to General Electric and that it is willing to consent to a late claim in that amount by General Electric. However, the Bankruptcy Code and Rules provide no procedure for allowance of the claim proposed by debtor. Under 11 U.S.C. § 501 and Bankruptcy Rules 3002 and 3004,³ General Electric was permitted to file a proof

³11 U.S.C. § 501 provides in pertinent part:

(a) A creditor . . . may file a proof of claim.
. . . .

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

Bankruptcy Rule 3002 provides in pertinent part:

(c) TIME FOR FILING. In a . . . chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341 of the Code

Bankruptcy Rule 3004 provides:

of claim within 90 days after the first date set for the § 341 meeting of creditors, and if General Electric had not filed its claim by the § 341 meeting date, debtor was permitted to file a claim on behalf of General Electric within 120 days after the § 341 meeting date. In this case, the § 341 meeting of creditors was set for January 3, 1992 and as General Electric had not filed a proof of claim by that date, debtor had until May 2, 1992 to file the claim. After that bar date, filing of a proof of claim for the debt due General Electric is not allowed. See In re Zimmerman, 156 B.R. 192 (Bankr. W.D. Mich. 1993).

Apart from her willingness to allow a late filing of a \$4,000.00 claim by General Electric, debtor has provided no other evidence that General Electric's interest in the mobile home is adequately protected. Debtor has not shown that it is willing or capable of making full monthly payments to General Electric to protect General Electric's interest during the pendency of this case. In the absence of such payment protection, General Electric should not be prevented from pursuing its remedies against the Kellys and/or the Viteks for a default under the security agreement

If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to § 341 of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c). . . .

simply because debtor entered bankruptcy when General Electric has no contractual relationship with debtor and never evaluated debtor's credit worthiness. Accordingly, I find under § 362(d)(1) that debtor has not carried her burden that General Electric's interest in the mobile home is adequately protected.

It is therefore ORDERED that General Electric Capital Corporation's motion for relief from the automatic stay is granted to foreclose its security interest in its collateral.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 21st day of September, 1993.