IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Dublin Division

IN RE:	)	Chapter 13 Case
	)	Number 97-30097
MARY ALICE GAFFNEY	)	
	)	
Debtor	)	
	)	
	)	
MARY ALICE GAFFNEY	)	FILED
	)	at 3 O'clock & 25 min. P.M.
Movant	)	Date: 1-22-98
	)	
vs.	)	
	)	
D.B. MCRAE & COMPANY	)	
	)	
Respondent	)	

ORDER

The debtor, Mary A. Gaffney, objected to the secured claim of D.B. McRae & Company ("McRae"), filed on May 27, 1997 showing principal, interest and penalties of $12,997.06 due under an installment land sales contract. In response McRae filed an amended proof of claim on September 23, 1997 revising its claim to $8,781.46 secured and $1,457.04 unsecured. Ms. Gaffney now objects only to the $1,457.04 unsecured portion of the claim and seeks to disallow this portion due to McRae's violation of United States District Court for the Southern District of Georgia Local Bankruptcy Rule

407.[1] In response to this objection McRae seeks a determination that the contract was canceled pre-petition, so Ms. Gaffney and, therefore, the bankruptcy estate have no interest in the property and that it should be granted relief from the § 362(a) stay to take possession of the property. I find the attempted pre-petition cancellation of the contract ineffective, debtor's estate holds an executory contract in the property, and the unsecured portion is disallowed based upon the creditor's violation of LBR 3001-1(c).

Ms. Gaffney and McRae entered a contract for the sale of realty on December 27, 1994. The property included lots 14 and 15 in the Scurry subdivision of McRae, Telfair County, Georgia. Ms. Gaffney made late and insufficient payments from the start, which McRae tolerated for 21 months. McRae sent a certified letter on October 24, 1996 to Ms. Gaffney, which she received. The letter stated:

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[1]By order dated July 1, 1996 issued by the Honorable B. Avant Edenfield, then Chief United States District Court Judge for this district, the local rules of this district were renumbered. Previous Rule 407 is now LBR 3001-1 which provides relevant to the matter before me:

LBR 3001-1(c) Service. All creditors and their counsel who file a proof of claim in this Court are hereby directed to serve by First Class Mail a true copy of said proof of claim and all attachments thereto upon the debtors' counsel of record at the address of said debtors' counsel shown on the Notice of the Creditors Meeting convened pursuant to 11 U.S.C. §341. The filing of such a proof of claim shall constitute a certificate by said creditor and/or its counsel that this order has been complied with. Said creditors and/or their counsel are, however, directed not to file any separate certificate of service in the Clerk's Office.

> In accordance with the terms and conditions of your sales contract, this is to notify you that I have no alternative, save and except to repossess the land and I am requesting that you make immediate arrangements to remove your mobile home and any other personal items off of my property. I strongly encourage you to comply with my request to prevent me from having you evicted or removed from my property through legal means, at which time any and all courts costs will be assessed to your account. You have thirty (30) days from the date of this letter to remove your mobile home and any other personal property from lots 14 & 15 of the Scurry Subdivision.

No further pre-bankruptcy efforts were made by McRae to take the property. Ms. Gaffney filed this case on March 13, 1997. A secretary employed at McRae filed the initial proof of claim but failed to send a copy to debtor's counsel in spite of the requirements of LBR-3001-1(c) and the clear statement contained in the outlined box to the right and adjacent to the signature line on the proof of claim form provided by the court and used by McRae, which states: "All creditors and their counsel who file a proof of claim are required to serve by first class mail a true copy of such proof of claim and all attachments thereto upon the Debtor's Counsel of Record whose address is shown on the Notice of the Creditor's Meeting." Ms. Gaffney objected to the claim. McRae amended the claim and the debtor continued the objection only to the unsecured portion. In response to the continued objection to claim, McRae seeks relief from stay to recover the property. Two issues require resolution. First, whether the contract for the sale of land was

canceled pre-petition. Second, whether LBR 3001-1(c) was violated by McRae's failure to serve Debtor's attorney a copy of its proof of claim, justifying disallowance of the unsecured portion of the amended proof of claim.

McRae argues the contract was rescinded pre-petition because it contained a "time is of the essence" clause and when the letter was sent advising Ms. Gaffney of its intent to repossess the property a valid rescission occurred upon expiration of the 30 day move-out period. Therefore, the land is not property of the estate because the debtor no longer held at the time of filing this case an interest requiring that relief from stay be granted. Debtor argues that McRae failed to fulfill the conditions to cancel the contract because no effort was taken to evict or regain possession; a "time is of the essence" clause did not exist in the contract, because the phrasing in the contract was not mandatory; and reasonable notice was not given to Ms. Gaffney. Thus, the contract exists and is executory and can be assumed and paid in full under Ms. Gaffney's plan. Based upon the facts presented at hearing and in analyzing the briefs presented by counsel, I apply the reasoning of my colleague, the Honorable James D. Walker, Jr. in the case In re Nix, Chapter 13 Case No. 96-42948 (Bankr. S.D. Ga. August 26, 1997, Walker, J.), in determining that McRae failed to rescind the contract pre-petition.

In Nix, the creditor contended that a land sales contract

with the debtor included a "time is of the essence" clause, which the creditor validly exercised to rescind the contract pre-petition. If the contract was validly rescinded the land was not property of the estate, thus entitling the creditor to relief from stay. Judge Walker found proper rescission did not occur and the estate retained an executory interest. Id.

> In Georgia, rescission is an appropriate remedy for the seller of land where the time is of the essence in the contract for sale and the buyer has defaulted by not making timely payment. See Smith v. Smith, 208 Ga. 300 (1951); McDaniel v. Gray & Company, 433 Ga. 433 (1882). Thus in order to decide whether Movant properly rescinded, and thereby terminated, the installment land sale contract pre-petition, it must be determined whether time was of the essence....In Georgia, "time is not generally of the essence of a contract; but, by express stipulation or reasonable construction, it may become so." O.C.G.A. § 13-2-2(9).

Id. slip op. at 5-6. The contract in this case does not include the language "time is of the essence."

> (G)enerally time is not of the essence of contracts for the sale of land; for such a construction would result in enforcing a penalty, 'which equity abhors and the law does not favor;' and interest will generally be treated as full compensation for the delay.

Ellis v. Bryant, 120 Ga. 890, 893, 48 S.E. 352 (1904).

However, paragraph 12[2] reasonably constructed establishes "time is

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[2]Paragraph 12 provides:

In the event the party of the second part fails to make two payments when due, then first party may notify second party by

of the essence" in the agreement as permitted under Georgia law. Paragraph 12 of the contract specifically gave McRae the option of a certified letter of notice to Debtor to cure the default or suffer cancellation of the contract and repossession by the creditor. Construction of words and their ordinary meanings in a contract is the way the terms should be construed. Stinchcomb v. Clayton County Water Auth., 177 Ga. App. 558, 340 S.E.2d 217 (1986).

As in Nix, if McRae waived the "time is of the essence" condition, reasonable notice must be given for proper rescission. The creditor in Nix was found to have waived its expressly stipulated clause by accepting late payments from the debtor for over two years before attempting to rescind. Id. slip op. at 7. Similarly, McRae has waived the "time is of the essence" condition by accepting late payments from Ms. Gaffney since the beginning of the contract and allowing the situation to continue for 21 months. The creditor in Nix failed to provide reasonable notice as required for rescission because the "time is of the essence" condition had been waived by prior conduct.

> Where time is of the essence and the right to rescind exists, some reasonable notice of the intent to exercise that right is warranted. See Burkhalter v. Roach, 142 Ga. 344, 349

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certified mail of his intent to cancel this contract and take possession of the premises, and if the payments are then not brought current, after the third payment is due by ten days or more, then first party at his option may declare this contract void and unenforceable, and retain all monies paid, as liquidated damages, and second party shall immediately vacate the premises.

> (1914). The notice should specify a date after which, if the arrearage has not been cured, the vendor will rescind. Id. Where, as here, the vendor of property has waived his rights arising under a "time is of the essence" provision, the requirement of proper notice of termination is even more indispensable.

Id. slip op. at 8. The letter sent by the creditor in Nix showed a clear intent to rescind the contract by notifying the debtor of a release of obligations, forfeiture of rights to the property, exercise of an immediate right to retake possession by the creditor, and demand for immediate removal by the debtor. Id. slip op. at 4, 9. McRae also showed its clear intent to rescind the contract in its October 24, 1996 letter by notifying Ms. Gaffney of her delinquency, an intent to repossess, and an order for immediate removal of personal property by Debtor within 30 days to avoid legal costs.

Reasonable notice, however, was not given by McRae. The Nix creditor included clear language in its letter to the debtor regarding its intent to rescind, but failed to give reasonable notice because recission was effective immediately. McRae's letter also lacked reasonable notice because Ms. Gaffney was required to leave the property. While she was allotted thirty days to do so, no opportunity exists from the language of the letter for payment of the delinquencies. Reasonable "notice should specify a date after which, if the arrearage has not been cured, the vendor will rescind." Id. slip op. at 8. No cure period is provided in McRae's

letter; merely a day by which to vacate.

Without reasonable notice, the letter sent to Ms. Gaffney is ineffective to rescind. Therefore, I find the contract remains valid, such that the debtor's estate retains an interest in the property. Pursuant to the "functional approach" analysis laid out in Nix, I find the contract to be executory. See id., slip op. at 9-11. Ms. Gaffney can deal with the executory contract in her plan by either assumption with appropriate cure of arrearage, or by rejection.

Remaining is whether this unsecured portion of McRae's claim should be disallowed under LBR 3001-1(c). Ms. Gaffney argues the unsecured portion of McRae's claim should be disallowed because McRae violated this rule by failing to serve Debtor's counsel a copy of the proof of claim. McRae responds that the filing was made by its secretary and any failure to serve was an honest mistake, lacking bad faith or intent. Although Federal Rule of Bankruptcy Procedure 9029(a) authorizes the imposition of rules governing the practice and procedures in all cases and proceedings within the District Court's bankruptcy jurisdiction and further provides under subparagraph (2) that "[a] Local Rule imposing a requirement of form shall not be enforced in a manner that causes a party to loose rights because of a nonwillful failure to comply with the requirement", the requirement imposed under LBR 3001-1(c) is not a requirement of form but one of notice. The requirement is designed

to provide the debtor, through counsel, with notice of the claims filed, the amounts, the status asserted by each creditor, and supporting documentation to facilitate the claims allowance process. This provides debtor's counsel a prompt and early review of claims, thus allowing an early objection when required, and leading to a prompt and timely resolution at the confirmation hearing of the debtor's plan. McRae acting through its authorized representative, the person preparing and submitting the proof of claim on its behalf, chose to ignore this requirement. In re Faires, 123 B.R. 393 (Bankr. D. Colo. 1991). The secretary's bad faith intent can be established by the secretary's conduct i.e. signing and filing a proof of claim and ignoring the clear requirement for service of the proof of claim on debtor's counsel. Rose v. Clark, 478 U.S. 570, 581, 106 S. Ct. 3101, 3107-08, 92 L. Ed. 2d 460 (1986); U.S. v. Pareja, 876 F.2d 1567, 1570 n. 13 (11th Cir. 1989); U.S. v. Vigil-Montanel, 753 F.2d 996, 999 (11th Cir. 1985). The requirement was clearly displayed in plain English adjacent to the signature line on the proof of claim. McRae through its authorized representative acted in bad faith in violating LBR 3001-1(c) authorizing the imposition of sanctions including the striking of the unsecured proof of claim. In re Williams, 191 B.R. 497 (Bankr. M.D. Ga. 1996) ("inherent" power of the Bankruptcy Court to sanction requires a finding of bad faith, notice and an opportunity to be heard); In re Olympia Holding Corp., 189 B.R. 846 (Bankr. M.D. Fl. 1995); In re

Lowe, 18 B.R. 20 (Bankr. N.D. 1981).

It is therefore ORDERED, that Debtor's objection to the unsecured portion of D.B. McRae & Company's claim is sustained, the claim is disallowed; and

It is further ORDERED that D. B. McRae & Company's motion for relief from stay is denied.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 22nd day of January, 1998.