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**In re Fabian R. REED and Emma M.J. Lewin Debtors.**

**No. 97-10624-FGC.**

United States Bankruptcy Court. D. Vermont.

May 27, 1998.

L.R. Amis, P.C., Burlington, VT, for Fabian R. Reed and Emma M.J. Lewin ("Debtors").

J.R. Canney III, Rultand, VT, ("Chapter 7 Trustee").

J.M. Sensenich, White River Junction, VT, ("Trustee").

D.J. Wolinsky, Saxer, Anderson, Wolinsky & Sunshine P.C., Burlington, VT, for White River Credit Union ("White River").

**MEMORANDUM OF DECISION DENYING CONFIRMATION**

CONRAD, Bankruptcy J.

**\*1** We are asked to decide [FN1] whether Debtors may exempt property realized from an avoided mortgage lien, or whether § 551 mandates preservation of that lien for the benefit of the estate. We decline to answer this question because no lien avoidance adversary proceeding has been filed by Debtor. To answer the question raised would be to give an advisory opinion. Debtors' plan classifies White River's interest as unsecured, and as such, does not provide for White River's allowed secured claim in violation of § 1325(a)(5)(B). Confirmation of Debtors' plan as submitted is hereby denied.

FN1. Our subject matter jurisdiction over this controversy arises under 28 U.S.C. § 1334 (b) and the General Reference to the Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 U.S.C. § 157(b)(2)(A), (B), (K), (L), and (O). This Memorandum of Decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. Rule 52, as made applicable by Fed.R.Bkrtcy P. Rule 7052.

**FACTS AND PROCEDURAL HISTORY**

On December 17, 1993, Debtors entered into an agreement with White River to mortgage Debtors' property located in Rochester, Vermont for \$75,000. Both Debtors' signatures appear in the appropriate places on the mortgage deed, but the deed, as filed with the Town Clerk in Rochester, lacks any witnesses.

Debtors filed a chapter 7 petition on April 22, 1997, and Chapter 7 Trustee filed an adversary proceeding seeking to avoid White River's mortgage encumbering Debtors' home. The case was converted to chapter 13 on January 8, 1998, and the adversary proceeding was dismissed. Debtors filed a plan of reorganization classifying White River's interest as unsecured and indicating intent to avoid the mortgage and exempt the resulting unencumbered interest. White River objects to the plan and to Debtors' amended exemption of \$85,550.00. White River's lien has not been avoided, and no adversary proceeding for avoidance is pending at this time.

### CONFIRMATION

Debtors' plan has not met the requirements of § 1325(a)(5) and may not be confirmed as submitted. Section 1325(a)(5) permits Debtors to have a plan confirmed over the objection of a secured creditor under certain conditions. There are three alternatives available to Debtors under § 1325(a)(5). Either a secured creditor must accept the plan, the plan must provide for the creditor to retain its lien and receive the full value of the property securing its claim, or a debtor must surrender the property secured by the lien.

White River filed a proof of claim on January 26, 1998. Debtors have not objected. Under § 502, "[a] claim or interest, proof of which is filed under section 501 of this title deemed allowed, unless a party in interest ... objects." 11 U.S.C. § 502(a). At this point, there have been no objections to White River's claim and the lien has not yet been avoided, White River's secured claim is deemed allowed. Debtors' plan fails to provide for the retention of White River's lien or the payment of the value of White River's claim, and Debtors do not provide for a surrender of the property. Confirmation must be denied.

### CONCLUSION

Debtors plan as submitted does not provide for White River's allowed secured claims, and is therefore denied. Parties shall settle an order in conformity with this memorandum within 10 days of issuance.

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