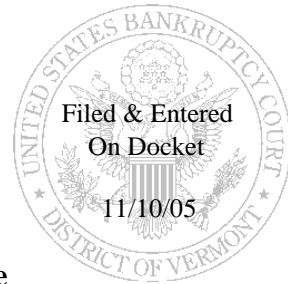


UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**ALLEN JOHN BARTLETT and
DAWN MARIE BARTLETT
Debtors.**

**Chapter 13 Case
05-10340**

**ALLEN JOHN BARTLETT and
DAWN MARIE BARTLETT
Plaintiffs,**

v.

**USDA, RURAL HOUSING SERVICE,
Defendant.**

**Adversary Proceeding
05-1038**

Appearances: *Geoffry F. Walsh, Esq.
Vermont Legal Aid
Springfield, Vt.
For the Plaintiffs/Debtors*

*Melissa A.D. Ranaldo, Esq.
U.S. Attorneys Office
Burlington, Vt.
For the-Defendant*

ORDER
DENYING DEFENDANT’S MOTION TO DISMISS

On July 11, 2005, Allen and Dawn Bartlett (the “Plaintiffs”) filed a complaint against the United States Department of Agriculture, Rural Housing Service (“RHS”) seeking a valuation of RHS’s interest in the Plaintiffs’ homestead property and a bifurcation of RHS’s claim into secured and unsecured portions, pursuant to § 506(a) (doc. #1).¹ The Complaint incorporates by reference RHS’s proof of claim and the attached promissory note, mortgage, and subsidy repayment agreement. In response to the Complaint, RHS filed an Amended Motion to Dismiss under Rule 12(b)(6)(doc. #13) (the “Motion to Dismiss”).² In the Motion to Dismiss, RHS asserts that the Complaint fails to state a claim upon which relief can be granted arguing that (1) the Debtors may not bifurcate the RHS claim under §1322 because the subsidy repayment agreement is secured only by the Debtors’ primary residence, and (2) the Court may not determine the value of the RHS claim because the amount of subsidy that the Plaintiffs are required to pay is contingent.

For the reasons set forth below, the Court denies the Defendant’s Motion to Dismiss.

¹ Unless otherwise specified, all statutory citations herein refer to the United States Bankruptcy Code as in effect prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 since this case was filed prior to October 17, 2005.

² RHS’s original motion to dismiss included a request for alternative relief in the form of summary judgment (doc. # 12). The Amended Motion to Dismiss seeks dismissal of the adversary proceeding for failure to state a claim, without a plea for alternative relief.

JURISDICTION

The Court has jurisdiction over this adversary proceeding, and the subject motion, pursuant to 28 U.S.C. §§ 157(b)(1), (b)(2)(B) and (b)(2)(K).

STANDARD OF REVIEW FOR A MOTION TO DISMISS

“A pleading which sets forth a claim for relief ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). “Given the Federal Rules’ simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (internal quotation marks, citation, and alteration omitted). “In order to survive a dismissal motion, a plaintiff must assert a cognizable claim and allege facts that, if true, would support such a claim.” Boddie v. Schnieder, 105 F.3d 857, 860 (2d Cir.1997). In determining the adequacy of the complaint, the court may consider any written instrument attached to the complaint as an exhibit or incorporated in the complaint by reference, as well as documents upon which the complaint relies and which are integral to the complaint. Internat’l Audiotext Network, Inc. v. AT & T Co., 62 F.3d 69, 72 (2d Cir.1995) (per curiam); see also, Hayden v. County of Nassau, 180 F.3d 42, 54 (2d Cir.1999) (“In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the facts stated in the complaint, documents attached to the complaint as exhibits and documents incorporated by reference in the complaint.”). A court may dismiss an action pursuant to Rule 12(b)(6) only if “it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief.” Jaghory v. N.Y. State Dep’t of Educ., 131 F.3d 326, 329 (2d Cir.1997).

BACKGROUND

The Plaintiffs purchased the home which is the subject of this proceeding in August 1984 (the “Property”) with financing from RHS in the original principal amount of \$49,500. The Plaintiffs executed a note and mortgage in favor of RHS. By its terms, the mortgage is secured by the dwelling, land, and “all improvements and personal property now or later attached thereto or reasonably necessary to the use thereof, including, but not limited to ranges, refrigerators, clothes washers, clothes dryers, or carpeting purchased or financed in whole or in part with loan funds.” The mortgage also secured the “recapture of any interest credit or subsidy which may be granted to the borrower by the Government pursuant to 42 U.S.C. § 1490a.” Apparently contemporaneously with the execution of the note and mortgage, the Plaintiffs executed a Subsidy Repayment Agreement in which the Plaintiffs agreed “that the real property described in the mortgage(s) listed above is pledged as security for repayment of the subsidy received or to be received.” The Subsidy Repayment Agreement referred to the mortgage executed by the Plaintiffs and was identified as a supplement to the note.

RHS has filed a proof of claim in which it asserts that its mortgage secures repayment of a total debt, as of the petition date, in the amount of \$109,748.42. The Plaintiffs do not dispute the amount of RHS's claim. However, the Plaintiffs contend that as of the petition date the Property had a fair market value of \$85,000 and that the RHS's secured claim may not exceed the value of the Property.

ISSUES PRESENTED

The issues presented in this adversary proceeding are whether the Plaintiffs have the right to bifurcate the RHS claim, and if so, what portion of RHS's allowed claim is secured and what portion is unsecured. The issue presented in the Motion to Dismiss is whether the Complaint fails to state a claim upon which relief can be granted either because (i) modification of RHS's secured status is prohibited under §1322(b)(2) or (ii) the portion of RHS's claim which arises from the subsidy payments recapture is contingent, and hence not susceptible to liquidation at this time.

DISCUSSION

Although RHS raises in this adversary proceeding what appears to be a new argument against modification of its mortgage, the questions of whether an RHS mortgage is protected by the anti-modification provisions of §1322(b)(2), and how to interpret subsidy recapture provisions in an RHS mortgage in the context of a bankruptcy case, are not new. In fact, our District Court considered very similar questions in a case with facts quite similar to those of the instant case in In re Loper, 222 B.R. 431 (D. Vt. 1998). In Loper, the debtors borrowed funds from RHS under terms nearly identical to those presented here, and sought to bifurcate RHS's claim into a secured component and an unsecured component, limiting the secured component of the RHS claim to the value of the debtors' homestead property. The Lopers asserted that RHS's mortgage loan claim was not immune from modification under §1322(b)(2), and could be modified like any other undersecured claim. The District Court ruled in favor of debtors based primarily upon the plain language of § 1322(b)(2). Id. at 437. There was no dispute that RHS's mortgage granted RHS a security interest in certain of the Lopers' personal property as well as the Lopers' residential real estate. Noting that § 1322(b)(2) grants protection from modification only to a security interest that is secured solely by the debtor's principal residence, the District Court found that the plain meaning of the statute entitled the debtors to bifurcate the RHS claim. Id. Although RHS presents a different rationale to justify its opposition to the debtors' bifurcation attempt in the instant proceeding, this Court finds the statutory interpretation, reasoning, and conclusion of the District Court in Loper compels a determination that the Complaint does state a cause of action upon which relief can be granted.

In the Motion to Dismiss, RHS argues that even if the mortgage is not protected from modification, the Subsidy Repayment Agreement cannot be modified by §1322(b)(2) (Memo at pp 8-11). For purposes of the Motion to Dismiss the Court must construe the Complaint in the light most favorable to the Plaintiff and in so doing finds that if, as the Plaintiffs contend, the Subsidy Repayment Agreement

is secured by the mortgage, then the Plaintiffs might be entitled to the relief they seek. While the Subsidy Repayment Agreement (Exhibit A to Complaint) grants RHS a security interest in the Property, the actual mortgage that secures the recapture is secured by both personal and real property (Id.). If the mortgage controls this determination, as the Plaintiffs argue, the Loper interpretation of the plain language of §1322(b)(2) might permit bifurcation. In re Loper, 222 B.R. at 437. The RHS position is novel and appears to have not yet been adjudicated. The Court makes no determination of the merits of this argument at this time. It simply finds that the Plaintiffs have presented a cognizable cause of action.

RHS also argues that the Court may not determine the value of RHS's claim because "the amount of subsidy the Bartletts [Plaintiffs] are actually required to repay is contingent and not finite." (Memo at p.4). However, RHS filed a proof of claim (Exhibit A to Complaint) and has not waived a dividend in this case. In the "wherefore clause" of their Complaint, the Plaintiffs ask that the Court "determine the allowed secured claim of the USDA Rural Housing Service to be \$85,000 . . . with the balance allowed as an unsecured claim." Such a request is contemplated under the Code and when made, the Code grants the Court authority to determine the value, or amount, of the claim as of the petition date. See §502. The fixing of claims is particularly essential in a chapter 13 case where the debtors are undertaking to repay a specified percentage of each claim. Considering the Complaint, including the prayer for relief, in the light most favorable to the Plaintiffs, the Court finds there is a basis upon which relief could be granted with respect to the determination of the RHS's allowed claim, and hence rejects this prong of the Defendant's argument.

Conclusion

In the context of this Motion to Dismiss the Court considers only the Complaint and the documents attached to the Complaint, construes the allegations of the Complaint liberally and in favor of the Plaintiff, and finds that the Plaintiffs have asserted a claim upon which relief may be granted. (The Court need not, and does not, make any determination as to the merits of the Complaint or the Defendant's arguments.) The Defendant has failed to persuade the Court that no relief could be granted to the Plaintiffs under any set of facts that could be proved consistent with the allegations of the Complaint.

Accordingly, IT IS HEREBY ORDERED that the Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED that the hearing currently scheduled for November 10, 2005 in this proceeding will take place as scheduled, and will be used for the purpose of formulating a scheduling order for resolving this adversary proceeding on the merits.

SO ORDERED.

November 10, 2005
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge