(Cite as: 1998 WL 283160 (Bankr.D.Vt.))

In re Penelope L. ARMS, Debtor.

No. 95-10489 FGC.

United States Bankruptcy Court. D. Vermont.

May 28, 1998.

M.C. Carter, and D.J. Wolinsky, Saxer Anderson Wolinsky & Sunshine P.C., Burlington, Vt., for Key Bank National Association ("Key Bank").

B.M. Lewis, Obuchowski Law Offices, Royalton, Vt, for Penelope L. Arms ("Debtor").

MEMORANDUM OF DECISION DENYING MOTION TO ENFORCE MODIFIED CHAPTER 13 PLAN

CONRAD, Bankruptcy J.

***1** Debtor seeks [FN1] to enforce the modified Chapter 13 Plan as against Key Bank. We deny the Motion to Enforce and vacate our Order to Modify because Debtor has not met the requirements prescribed for post-confirmation plan modification.

> 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), (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.

FACTUAL AND PROCEDURAL HISTORY

Debtor filed a petition under Chapter 13 on June 29, 1995. At the time, she owned four properties in Rockingham, Vermont. [FN2] By virtue of a single promissory note and four mortgages, one executed for each property, Key Bank is fourth mortgagee on the Green Street, Hapgood Street and Pine Street properties, and holds a third mortgage on the Henry Street property. According to the terms of Debtor's confirmed First Amended Plan of Reorganization ("Plan"), Key Bank's claim on the Pine and Henry Street properties was to be paid "all principal and interest as allowed" upon the sale or disposition of each as described under the Plan, and Key Bank was to retain its lien on the properties until the sales closed.

Plan p. 3. Debtor was charged with marketing the properties for sale, and if unsuccessful after approximately one year, was to surrender the Pine and Henry Street properties to the holder of the first mortgage, Homeside Lending, [FN3] for marketing. At this point, there is no evidence the properties have been marketed, and Key Bank has not been paid anything on its claim.

FN2. Those properties are Pine Street, Henry Street, Hapgood Street and Green Street.

FN3. The mortgages were assigned to Homeside Lending from BancBoston on March 2, 1997.

Debtor sought to modify the Plan to require Key Bank to discharge its mortgages on the surrendered properties. Key Bank objected, and the Motion to Modify was denied after a hearing. The transcript of that hearing shows that we found the Plan provided "in the event [the two properties] do not sell, there is no release of the lien; so [Debtor's] request (for modification) is denied." September 23, 1997 Hearing, p 4. Debtor protested, arguing that because the property was "disposed of," Key Bank's liens should be released. We again disagreed with Debtor, interpreting the triggering event requiring release of the liens to be "an anticipated sale, not just a turnover," and refused to order Key Bank to release its liens. Id. A Motion for Reconsideration was submitted, and, with no explanation in the record, was granted. The Order states that "the mortgage of Key Bank shall be discharged upon turnover of the real properties as set forth in the confirmed Plan; and ... Key Bank, shall immediately discharge its mortgage on the Debtor's remaining properties." Order Modifying Plan. Key Bank filed a Notice of Appeal, which we dismissed on October 30, 1997, as untimely filed. We denied Key Bank's later Motions to Reconsider and To Extend the Time to file a Notice of Appeal. Key Bank appealed to the District Court and our Order to Dismiss Key Bank's Notice of Appeal was affirmed. (Key Bank National Association v. Peneplope L. Arms, D .Vt, 2:97-CV-429, 1998). In the interim, Key Bank moved for a Stay Pending Appeal,now moot, and Debtor filed a Motion to Enforce the modified Plan.

MOTION TO ENFORCE

***2** It should be noted that once a notice of appeal is filed, the bankruptcy court loses all jurisdiction with regard to the subject matter of the appeal. In re Bialac, 694 F.2d 625 (9th Cir.1982). Debtor's Motion to Enforce the modified Plan, filed on January 29, 1998, could neither be granted nor denied at that time because it was filed after Key Bank's appeal on November 20, 1997. If an order to enforce was issued prior to the filing of a notice of appeal, Key Bank would have been under an obligation, absent a stay, to release its liens. Presently, no appeal is pending, so the issue is currently ripe for decision.

In order to assess whether the modified Plan should be enforced, we find it necessary to revisit the Order Modifying the Plan. We vacate that Order, as we are empowered to do so as

"long as no intervening rights have become vested in reliance on the orders." Cisneros v. United States, 994 F.2d 1462, 1466 (9th Cir.1993) (citing In re Lenox 902 F.2d 737, 739-40 (9th Cir.1990). Here, the modified plan has not yet been enforced, and no intervening rights have become vested.

Certain requirements are necessary for modification of a confirmed plan. Section 1329 permits modification of a plan after confirmation to: "(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; or (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan." 11 U.S.C. § 1329(a). Any modification, however, must comply with §§ 1322(a), 1322(b), 1323(c), and, most significantly, 1325(a). 11 U.S.C. § 1329 (b). Under § 1325(a), to have a plan confirmed over the objection of a secured creditor, one of the following three acts must take place with respect to each allowed secured claim provided for by the plan:

(A) the holder of such claim has accepted the plan; (B)(I) the plan provides that the holder of such claim retain the lien securing such claim; and (ii) the value, as of the effective date of the plan, of property to be distributed under the plan is not less than the allowed amount of such claim; or (C) the debtor surrenders the property securing such claim to such holder. 11 U.S.C. § 1325(a)(5) (emphasis added).

Either the secured creditor accepts the plan, and the debtor surrenders the property to that creditor, or the creditor retains its lien on the property and receives full value of the property under the plan. Key Bank objected to the Motion to Modify, and the property was surrendered, but not to Key Bank. Debtor is left with the requirements of subsection (B), and by terms of the modification itself, has not met those requirements. The Plan as modified demands the relinquishment of Key Bank's liens, and because Key Bank has not been paid anything on its claim, it will likely not see a penny if the mortgages are discharged. Debtor failed to satisfy the cramdown provision contained in chapter 13 required for modification and, admitting our plain error, the Plan should not have been modified. In addition, the modification does not slip into any of the three categories listed in § 1329(a). Requiring Key Bank to change its status to unsecured by forcing it to release its liens does not constitute 1) an increase or reduction in payments, 2) an extension or reduction of time for payments, or 3) an alteration in the distribution to account for payments made outside the plan. 11 U.S.C. § 1329(a).

***3** If themodified Plan is enforced, Key Bank will be required to discharge the mortgages encumbering the Pine and Henry Street properties. At this point, Debtor has no interest in the properties because title was transferred to Homeside Lending. Although personal liability would continue to exist as to Debtor, it will likely be discharged through the bankruptcy. By retaining its right to foreclose the two mortgages, Key Bank retains a remedy against Homeside Lending alone to collect the debt incurred by Debtor. See generally Milner v. Smith,

53 Vt. 151 (1881). If Key Bank is forced to release its mortgages on the two surrendered properties, it will have no recourse at all to collect its debt. This would change Key Bank's status from a fully secured creditor to a partially secured, partially unsecured creditor.

Debtor claims that if the Plan is not enforced and the mortgages not discharged, she will be prevented from refinancing the two retained properties and funding the Plan, thereby being denied her a fresh start. This is a result likely contemplated at the onset. Debtor has shown no significant change in her financial situation, a requirement for modification post-confirmation. In re Klus, 173 B.R. 51, 59 (Bkrtcy.D.Conn.1994). She may possibly be denied credit, but this is a common and expected outcome of bankruptcy. Debtor has not persuaded us that refinancing would even be available if the liens were discharged, or that there are no other means by which she could fund the plan, therefore, we can only guess as to whether fresh start would be denied.

As already discussed, Debtor surrendered part of the collateral securing a first mortgage to Homeside Lending, so if Key Bank is forced to discharge its liens, it may not even proceed against Homeside and will lose its claim altogether. Key Bank would therefore lose any recourse on a currently secured debt, a result not contemplated by anyone. Requiring Debtor to meet the cramdown provisions on post-confirmation modification mirrors the interest in requiring any debtor to meet the cramdown provisions for confirmation. It was Congress' intent to protect the secured creditor to the extent of the value of the collateral securing the claim. 124 CongRec H11107 (daily ed. Sept. 28, 1978); S17423 (daily ed. Oct. 6, 1978; remarks of Rep. Edwards and Sen. DeConcini). By ignoring the cramdown provisions contained in § 1325(a)(5), Congressional intent is thwarted.

CONCLUSION

No rights have become vested as a result of the Order to Modify because the Order has not yet been enforced. We therefore vacate that Order. Key Bank shall settle an Order in conformity with this decision within 5 days.

1998 WL 283160 (Bankr.D.Vt.)

Back to Opinions by Citation
Back to Opinions by Date

OR
Or Search for Keywords