UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	**)**	
	)	
Carrie Joy Nunnery,	**)**	**Case No. 11-80267**
	)	
Debtor.	**)**	

ORDER DENYING VANDERBILT MORTGAGE AND FINANCE, INC.'S MOTION TO REMOVE IT AT AS A LISTED CREDITOR AND TO DECLARE THAT VANDERBILT IS NOT BOUND BY THE TERMS OF THE CHAPTER 13 CASE

THIS MATTER came on for hearing before the undersigned bankruptcy judge on Vanderbilt Mortgage and Finance, Inc.'s ("Vanderbilt") Motion to remove it as a listed creditor and to declare that Vanderbilt is not bound by the terms of the Chapter 13 case, or Motion for Valuation. Donald Coomes appeared on behalf of the Debtor, Jay Green appeared on behalf of Vanderbilt, and Benjamin Lovell appeared on behalf of the Chapter 13 Trustee.

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and Local Rule 83.11 of the United States District Court for the Middle District of North Carolina. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

FACTS

On June 27, 1998, the Debtor and Jerry Adam Nunnery ("Mr. Nunnery") were married. Nearly five months later, on November 16, 1998, Mr. Nunnery executed and delivered a Retail Installment Contract and Security Agreement ("Contract") to Oakwood Mobile Homes Inc. ("Oakwood") for the purchase of a 1998 Oakwood manufactured home. According to the terms of the Contract, Mr. Nunnery promised to pay the principal sum of $61,071.81 plus interest at the rate of 10.5% per year, resulting in 360 successive monthly installments of $558.65 each

commencing January 1, 1999 until the indebtedness was paid in full. The Contract also provided that Mr. Nunnery could not transfer any rights in the property without Oakwood's written consent. Furthermore, regarding default, the Contract stated that if Oakwood failed to act on an event of default, it did not give up its right to later treat that type of event as a default.

The Contract created a security interest in the manufactured home. The security interest was duly perfected by registration with the Division of Motor Vehicles on the certificate of title to the manufactured home. Subsequent to the execution of the Contract, Oakwood assigned all of its rights, title, and interest in the Contract to Vanderbilt. The manufactured home has at all times been located on four acres of land, located at 1199 Cumnock Road, Sanford, Lee County, North Carolina. The real property on which the manufactured home is located is titled in the name of the Debtor's mother, Darlene Hudson. The Debtor did not sign the Contract because Mr. Nunnery intended for the manufactured home to be his individual property. During the course of the marriage, the Debtor did contribute a portion of her monthly income to the monthly payments to Vanderbilt.

On February 1, 2002, the Debtor and Mr. Nunnery separated and Mr. Nunnery ceased residing in the manufactured home. On June 6, 2003, Mr. Nunnery and the Debtor executed a Separation Agreement and Property Settlement. Pursuant to the terms of the Separation Agreement and Property Settlement, Mr. Nunnery agreed to quitclaim any interest he had in the manufactured home to the Debtor. In turn, the Debtor agreed to assume and hold Mr. Nunnery harmless for any and all outstanding debt on the manufactured home. In addition, on June 6, 2003, Mr. Nunnery executed a Power of Attorney agreement that authorized the Debtor to sign his name in order to transfer title to the manufactured home. On July 16, 2003, a Judgment of

Absolute Divorce was entered by the District Court of Lee County, North Carolina.

For the next seven years, the Debtor made the monthly payments to Vanderbilt and was responsible for the maintenance of the manufactured home. The monthly payment to Vanderbilt included homeowner's insurance. The Debtor would often wire the money to Vanderbilt using Western Union, with the Debtor's name appearing on the transfer. On certain occasions, the Debtor would fail to timely make the monthly payments. On such occasions, Vanderbilt would telephone the Debtor at her residence to inquire about the lapse in payments. The Debtor informed Vanderbilt that Mr. Nunnery no longer resided at the manufactured home and requested that the Contract be amended to substitute her name for that of Mr. Nunnery. Vanderbilt declined the Debtor's request. Although the Debtor was making the monthly payments to Vanderbilt, she did not deduct the interest paid on the mobile home on her income taxes. The 1099 forms were mailed to the Debtor's residence but were in Mr. Nunnery's name and under his social security number.

The Debtor filed her first petition for relief under Chapter 13 of the Bankruptcy Code on May 13, 2010 (case number 10-80847). Proper notice was mailed to Vanderbilt and Vanderbilt filed a Proof of Claim in the amount of $64,323.21, of which $9,445.53 represented arrearages. On September 1, 2010, Vanderbilt filed an Objection to Valuation of Manufactured Home, and Request for Hearing to Determine Secured Status. In its Objection, Vanderbilt acknowledged the Debtor's claim of an equitable interest, but contested the Debtor's value. The plan was confirmed, providing payment to Vanderbilt. On January 1, 2011, the Debtor's first case was dismissed for failure to make plan payments.

The Debtor filed the current petition for relief under Chapter 13 of the Bankruptcy Code

on February 15, 2011. On February 28, 2011, Vanderbilt filed a Proof of Claim in the amount of $62,395.15, of which $8,183.83 represented arrearages. The Debtor filed a notice of proposed Chapter 13 plan on March 2, 2011. The Debtor's proposed plan valued Vanderbilt's secured claim at $9,000.00, to be repaid over the life of the plan in the amount of $170.87 per month at a permanently fixed interest rate of 5.25%. The Debtor's proposed plan further stated than any objection to valuation must be filed as a formal objection to valuation not later than 60 days from the date of the entry of the order confirming the plan. On March 16, 2011, Vanderbilt filed the Motion that is now before the Court contending that it is not a creditor in this bankruptcy proceeding, that the automatic stay of 11 U.S.C. § 362 is not applicable to Vanderbilt, and that in the alternative, if the Court finds Vanderbilt is a creditor, that the proper fair market value of the mobile home is $30,000.00.

ISSUES PRESENTED

At the outset, the Court acknowledges that Vanderbilt now concedes that it is subject to the automatic stay of 11 U.S.C. § 362 as the Debtor maintains a possessory interest in the manufactured home. Thus, the Court is left to address three issues. First, whether the Debtor has an ownership interest in the manufactured home. Second, if the Debtor does have an ownership interest in the manufactured home, whether the Debtor can include Vanderbilt's claim in her plan of reorganization. And finally, if the Debtor can include Vanderbilt's claim in her chapter 13 plan, whether the Debtor can accomplish a cram down of Vanderbilt's claim pursuant to 11 U.S.C. 506(a)(1).[1]

[1] In pertinent part, § 506(a)(1) provides that:

An allowed claim of a creditor secured by a lien on property in which the estate

DISCUSSION

I. Ownership of the Manufactured Home

The first issue is whether the Debtor is the owner of the manufactured home. If not, then the Court's inquiry is at an end. While it is undisputed that Mr. Nunnery is the record owner of the manufactured home, the Debtor contends that Vanderbilt should be equitably estopped from challenging her ownership interest. Black's Law Dictionary defines equitable estoppel as "[t]he doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had." Black's Law Dictionary 483 (5th ed. 1979). As noted by the North Carolina Court of Appeals:

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Friedland v. Gales, 131 N.C.App. 802, 807, 509 S.E.2d 793, 796-97 (N.C. Ct. App. 1998) (citing *Parker v. Thompson-Arthur Paving Co.*, 100 N.C.App.367, 370, 396 S.E.2d 626, 628-29 (N.C. Ct. App. 1990). In addition, "[t]he party seeking to invoke the doctrine of equitable estoppel must plead facts sufficient to raise an issue as to its application." *Id*.

The Court finds that Vanderbilt is equitably estopped from asserting that the Debtor is

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> has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

11 U.S.C. § 506(a)(1).

not the equitable owner of the manufactured home. There are a number of facts that support a determination that the Debtor is not the equitable owner of the property: (1) title to the manufactured home is not in the Debtor's name; (2) the debt is not in the Debtor's name; (3) the language found in the Separation Agreement does not help the Debtor's cause;[2] and (4) Vanderbilt has never issued interest statements in the Debtor's name. A review of all the relevant facts leads the Court to the opposite conclusion.

The Debtor made the monthly payments to Vanderbilt and maintained the property for seven years after Mr. Nunnery ceased residing in the manufactured home. It is evident that Vanderbilt knew of the situation because it frequently communicated with the Debtor by calling her home and asking to speak with her directly. At no time while the Debtor made the regular monthly payments, even when she missed payment, did Vanderbilt elect to initiate an eviction or foreclosure proceeding. The Debtor continued to make the monthly payments to Vanderbilt in

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[2] In *D.A.N. Joint Venture, III, L.P. v. Fenner*, 181 N.C. App. 759, 640 S.E.2d 869 (N.C. Ct. App. 2007) (unpublished table decision), the North Carolina Court of Appeals stated:

> Throughout the course of litigation, defendant argued that "my divorce decree and separation agreement released me from any claim on the NationsCredit loan," because "my ex-husband had assumed responsibility for any debt owed." However, neither NationsCredit, Cadle Company, nor plaintiff were parties to the separation agreement, and therefore, they are not contractually bound by the terms of the separation agreement. In fact, defendant and husband entered into the separation agreement long after defendant signed the credit line agreement. The separation agreement had no legal effect on defendant's obligation to satisfy the jointly-held debt in the event of husband's breach, even though husband contractually agreed to assume the debt in question. Defendant's repeated assertions that the separation agreement extinguished her obligation to plaintiff were erroneous as a matter of law.

Id. (citation omitted).

reliance that she would be permitted to continue residing in the manufactured home with her two minor children. Despite knowing that the Contract prevented Mr. Nunnery from transferring any interest in the manufactured home without Vanderbilt's consent, Vanderbilt was content to sit on its rights and collect payments from the Debtor. As stated by the court in *In re Everhart*, 87 B.R. 35 (Bankr. N.D. Ohio 1988), "[t]o avoid the untoward harsh result which would be visited upon the Debtor if [the Creditor] was allowed to escape a debtor–creditor relationship which it had ratified by its conduct, equity consideration should and will be afforded." *Id*. at 37. Consequently, because Vanderbilt elected to remain silent when it had the right to initiate a foreclosure proceeding, the Court concludes that the Debtor is the equitable owner of the manufactured home and that Vanderbilt holds a claim against the Debtor's estate.

II. Inclusion of Vanderbilt's Claim in the Debtor's Plan of Reorganization

Section 1322(b) typically allows a debtor to propose to "modify the rights of holders of secured claims . . . through the plan." 11 U.S.C. § 1322(b). Therefore, "'claimholder' status presumptively forms a condition precedent to a creditor's mandatory participation in the debtor's plan." *In re Hutcherson*, 186 B.R. 546, 548 (Bankr. N.D. Ga.1995). In the present case, Vanderbilt argues that, even though it filed a proof of claim in both the Debtor's previous and current bankruptcy proceedings, it nonetheless does not have a "claim" within the definition of 11 U.S.C. § 101(5)(A) because it has no "right to payment" from the Debtor.[3] Vanderbilt asserts that, because privity of contract does not exist between itself and the Debtor, it is not owed any money by the Debtor and thus cannot be forced to accept the terms of payment provided by the

[3] Section 101(5)(A) states that the term claim means "right to payment, whether or not such right is reduced to judgment, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . ." 11 U.S.C. § 101(5)(A).

plan of reorganization. The Court does not find this argument persuasive. As such, the Court holds that Vanderbilt does have a claim within the definition of § 101(5) and that privity of contract is not required in order for the Debtor to include Vanderbilt's claim in her chapter 13 plan.

In *In re Evans*, No. 11-80123, 2011 WL 1420887 (Bankr. M.D.N.C. Apr. 11, 2011), this Court held that a creditor will be deemed to hold a claim in a bankruptcy proceeding, even if the debtor did not execute the note and deed of trust, where the creditor holds a claim that is enforceable against property of the estate. *Id.* at *2 (citing *Johnson v. Home State Bank (In re Johnson)*, 501 U.S. 78, 85 (1991)). As the Supreme Court noted in *Johnson*:

> [Section] 102(2) establishes, as a "[r]ul[e] of construction," that the phrase " 'claim against the debtor' includes claim against property of the debtor." A fair reading of § 102(2) is that a creditor who, like the Bank in this case, has a claim enforceable only against the debtor's property nonetheless has a "claim against the debtor" for purposes of the Code.

Johnson, 501 U.S. at 85. Though the present case involves personal property, the Court is compelled to conclude that, as long as a debtor is the equitable owner of the subject property, privity of contract is not required for the creditor to have a claim against the debtor's estate. *Cf. In re Rutledge*, 208 B.R. 624 (Bankr. E.D.N.Y. 1997) ("[T]his Court believes that the Supreme Court's decision in *Johnson* . . . mandates a decision by this Court permitting a Chapter 13 debtor who is the owner of real property to cure a pre-petition default under a mortgage, even if that debtor lacks privity with the mortgagee."); *In re Allston*, 206 B.R. 297, 299 (Bankr. E.D.N.Y. 1997) ("The reasoning set forth in the *Hutcherson* and *Johnson* decisions persuade this Court that Republic holds a 'claim' against the Debtors' estate, even though no privity of contract ever existed between it and the Debtors.") *In re Lumpkin*, 144 B.R. 240, 242 (Bankr. D. Conn. 1992)

("In sum, a chapter 13 plan may deal with a claim where there is no personal liability no matter what circumstances underlay the lack of personal liability.").

III. Cram Down of Vanderbilt's Claim in the Debtor's Plan of Reorganization

Section 1322(b)(2) of the Bankruptcy Code enables a chapter 13 plan to "modify the rights of holders of secured claims . . . ." 11 U.S.C. § 1322(b)(2). Together "with § 506(a)(1), this provision has historically resulted in confirmed chapter 13 plans that reduce the secured portion of a . . . lender's claim to the value of the collateral, with said amount paid with interest during the plan." *In re Johnson*, 337 B.R. 269, 270 (Bankr. M.D.N.C. 2006). In such situations, the balance of the secured creditor's claim is deemed unsecured. § 506(a)(1); *see In re Price*, 562 F.3d 618, 623 (4th Cir. 2009). There are exceptions to § 1322(b)(2), but none of those are applicable here.[4] Accordingly, the Court holds that, because the Debtor is the equitable owner of the manufactured home, the Debtor may cram down Vanderbilt's secured claim in her chapter 13 plan.[5] *See In re Rivers-Jones*, No. 07-02607-JW, slip op. at 7 (Bankr. D.S.C. Sept. 4, 2007). Not

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[4] There are two major exceptions to the provisions to § 1322(b)(2). First, a debtor may not modify the rights of a creditor if that creditor's claim is "secured only by a security interest in real property that is the debtor's principal residence . . . ." § 1322(b)(2). Second, pursuant to the "hanging paragraph" of § 1325(a):

> [S]ection 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

§ 1325(a).

[5] The Court acknowledges that its Order does not affect Mr. Nunnery's interest in the manufactured home, as he is still the record owner of the property. Furthermore, the Court's

surprisingly, the Debtor and Vanderbilt differ as to what value should be assigned to the manufactured home. The Debtor values the property at $9,000.00. By contrast, Vanderbilt values the property at $30,000.00. As no hearing has yet been held to determine the value of the manufactured home, the Court reserves any determination regarding the value of the property for a future date.

CONCLUSION

For the foregoing reasons, the Court concludes that: (1) the Debtor is the equitable owner of the manufactured home; (2) the Debtor may include Vanderbilt's claim in her plan of reorganization; and (3) the Debtor may cram down Vanderbilt's claim pursuant to § 506(a)(1) of the Code.

IT IS SO ORDERED.

Catharine R Aron

August 17, 2011

UNITED STATES BANKRUPTCY JUDGE

Order does not affect any rights that Vanderbilt may have against Mr. Nunnery under state law.

SERVICE LIST

Carrie Joy Nunnery
Debtor

Donald L. Coomes
Attorney for Debtor

Jay B. Green
Attorney for Vanderbilt

Richard M. Hutson, II
Trustee