

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

In re:)	
)	
Joseph Cortez Evans and)	Case No. 11-80123
Marsha Ann Evan,)	
)	
Debtors.)	
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**ORDER AND OPINION DENYING
MOTION FOR RELIEF FROM STAY**

THIS MATTER came on for hearing before the undersigned bankruptcy judge upon Financial Freedom Acquisition LLC’s Motion for Relief from Stay. Appearing at the hearing was Terry D. Fisher, attorney for the Debtors, Kimberly A. Sheek, attorney for Financial Freedom Acquisition LLC (the “Creditor”), and Benjamin Lovell, attorney for the Chapter 13 Trustee. After consideration of the Creditor’s motion, the arguments of counsel, and other matters of record, the Court finds as follows:

FACTS

The Debtors are the owners of real property located at 207 Apex Street in Durham, North Carolina (the “Property”), which serves as their principal residence. The Property is subject to a reverse mortgage in favor of the Creditor by virtue of a note and deed of trust executed by Ola May Evans Bynum on September 7, 2007 in the original principal amount of \$70,000.00. The reverse mortgage includes a provision requiring immediate payment in full upon the death of the borrower. Mrs. Bynum passed away and the Debtors inherited the Property prepetition. Pursuant to the terms of the reverse mortgage, the debt became due in full upon Mrs. Bynum’s death, and the Creditor instituted foreclosure proceedings.

The Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code on January 24, 2011 (the “Petition Date”). The Debtors listed the Property on Schedule A of their petition with a value of \$70,000.00 and listed the Creditor as the holder of a reverse mortgage on Schedule D. The Debtors propose to pay the Creditor in full through their Chapter 13 plan. In its motion seeking relief from the automatic stay, the Creditor contends that the total payoff due on the loan is \$33,688.35, and that pursuant to a “drive by” appraisal, the value of the Property is \$28,500.00.

ANALYSIS

The Creditor contends the Debtors’ proposal to pay the reverse mortgage through the Chapter 13 plan impermissibly modifies the Creditor’s rights in violation of § 1322(b)(2). The Court disagrees. On the Petition Date, the Property became property of the estate pursuant to § 541 of the Bankruptcy Code. 11 U.S.C. § 541. As such, the Property falls under the scope of § 362, which operates to stay the enforcement against property of the estate of a judgment obtained prepetition and any act to obtain possession of property of the estate. 11 U.S.C. § 362(a). Despite the fact that the Debtors did not execute the note and deed of trust for the reverse mortgage and, as a result, are not personally liable for the debt, the Creditor has a claim in this proceeding, as it holds a claim enforceable against property of the estate. *Johnson v. Home State Bank*, 501 U.S. 78, 85 (1991). *See also In re Cady*, 440 B.R. 16, 23 (Bankr. N.D.N.Y. 2010) (holding that lender with mortgage on property transferred without lender’s consent to debtor, who was not obligated on the note, was nonetheless a “creditor” with “claim” that could be dealt with in debtor's plan); *In re Curinton*, 300 B.R. 78, 84 (Bankr. M.D. Fla. 2003) (interpreting the

term “claim” to include a defaulted mortgage on property owned by the debtor when no privity of contract exists between the debtor and creditor).

Section 1322(b)(2) prohibits the modification of a claim that is secured only by a security interest in real property that is the debtor’s principal residence. 11 U.S.C. § 1322(c). Section 1322(c)(2) provides an important exception to § 1322(b)(2), providing debtors with the opportunity to pay a mortgage indebtedness that has matured or ballooned prepetition over the term of a Chapter 13 plan. Section 1322(c)(2) states:

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law--

...

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

11 U.S.C. § 1322(c). The facts of this case fall squarely under this provision as the property securing the reverse mortgage is the Debtors’ principal residence and the last payment on the original payment schedule became due upon Mrs. Bynum’s death, prepetition. *E.g. In re Newcomer*, 438 B.R. 527, 542 n.14 (Bankr. D. Md. 2010) (stating that the majority view since the Supreme Court's decision in *Johnson* is that it is appropriate to permit a Chapter 13 debtor who is the owner of real property to cure a prepetition default under a mortgage, even if the debtor lacks privity with the mortgagee); *In re Brown*, 428 B.R. 672, 677 (Bankr. D.S.C. 2010) (holding that § 1322(c)(2) permits debtor to pay full amount of reverse mortgage on inherited property which became due in full prepetition in Chapter 13 plan); *In re Wilcox*, 209 B.R. 181, 182 (Bankr. E.D.N.Y. 1996) (holding that debtor could pay reverse mortgage on inherited property through Chapter 13 plan).

Based upon the foregoing, and as the Debtors have proposed to pay the Creditor's claim in full inside their Chapter 13 plan and are currently current with their plan payments, the Creditor's Motion for Relief from Stay is DENIED.

SERVICE LIST

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Marsha Ann Evans
Debtors

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