UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re: BKY 04-34379 DDO

John S. Zobel,

Debtor. Chapter 13 Case

NOTICE OF MOTION AND MOTION OBJECTING TO CONFIRMATION OF CHAPTER 13 PLAN

TO: THE DEBTOR AND OTHER ENTITIES SPECIFIED IN LOCAL RULE 9013-3.

1. Suburban Exteriors, Inc. ("Movant"), a creditor in the above case, by its undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 10:30 a.m. on October 14, 2004, before the Honorable Dennis D. O'Brien at the United States Bankruptcy Court, Courtroom 228A, U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered no later than 10:30 a.m. on October 13, 2004, which is twenty-four (24) hours before the time set for the hearing, or filed and served by mail no later than October 8, 2004, which is three (3) business days before the time set for the hearing. UNLESS A RESPONSE OPPOSING THIS OBJECTION IS TIMELY FILED, THE COURT MAY GRANT THE RELIEF REQUESTED WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, Bankruptcy Rule 5005, and Local Rule 1070-1. This is a core proceeding. The petition commencing this Chapter 13 case was filed on July 29, 2004. This case is now pending in this Court.

5. This motion arises under 11 U.S.C. §§ 1322 and 1325. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 3020-1,3020-3, 9006-1, 9013-1 through 9013-3 and 9017-1. Movant hereby objects to confirmation of Debtor(s) Chapter 13 Plan.

6. Movant is the holder of a secured claim in the amount of $33,908.05, and thus is a party in interest.

7. Movant objects to confirmation of Debtor's Chapter 13 Plan for the following reasons:

A. The Plan has not been proposed in good faith in violation of §1325(a)(3)
B. The Plan does not provide that the Movant's entire claim will be treated as a secured claim in violation of §1325(a)(5), §1325(a)(1) and §506(b).
C. The Plan does not provide the Movant with the value of property that the Movant would receive if the debtor was liquidated in violation of §1325(a)(4).
D. The Plan proposes to modify Movant's secured interest in Debtor's principal residence in violation of 11 U.S.C. §§ 1322(a)(3) and 1322(b)(2) as contemplated under 11 U.S.C. § 1325(a)(1).

8. Movant has incurred and will incur legal fees and costs to protect and pursue its rights in the collateral.

9. Movant gives notice that it may, if necessary, call Ken Kerley to testify regarding the indebtedness and property value.

10. A separate Memorandum of Facts and Law is being submitted with this objection.

11. THIS IS A COMMUNICATION FROM A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THIS PURPOSE.

WHEREFORE, Suburban Exteriors, Inc. moves the Court for an order denying confirmation of Debtor's Chapter 13 Plan and for such other relief as may be just and equitable.

HELLMUTH & JOHNSON, PLLC

Dated: October 6, 2004.

By: _____

David G. Hellmuth, #229131
Blake R. Nelson, #259767
Attorneys for Movant
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
Telephone: (612) 941-4005

UNITED STATES BANKRUPTCY COURT
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MEMORANDUM OF FACT AND LAW

Suburban Exteriors, Inc. ("Movant") submits this Memorandum of Fact and Law in support of its Objection to Confirmation of Chapter 13 Plan in the above-entitled matter.

FACTS

Movant holds a claim for $33,908.05 and is a party in interest.

Movant's claim is secured by a mechanic's lien on Debtor's real property and principal residence located 1434 Kingswood Road, Eagan, MN 55122. Debtor's Plan does not treat Movant as a fully secured party.

ARGUMENT

I. THE PLAN IS NOT PROPOSED IN GOOD FAITH.

Pursuant to 11 U.S.C. §1325(a)(3), a Chapter 13 Plan must be proposed in good faith to be confirmed. The Court must consider the totality of the circumstances in determining whether a Chapter 13 Plan has been proposed in good faith. In Re LeMaire, 898 F.2d 1345 (8th Cir. 1990); In Re Estus, 695 F.2d 311 (8th Cir. 1982); Education Assistance Corp. v. Zellner, 827 F. 2d 1222 (8th Cir. 1987).

In the present case, the Debtor is attempting to reduce Movant's secured claim against Debtor's principal residence in violation of 11 U.S.C. §§ 1322(a)(3) and 1322(b)(2). As a secured creditor, Movant is also entitled to interest on its entire claim and any reasonable fees and cost or charges pursuant to 11 U.S.C. 506(b). By attempting to treat Movant's claim as only partially secured, Debtor is denying Movant of its rights under the Bankruptcy law. The Movant's Order and Judgment for a $30,756.65 mechanic's lien claim against Debtor's principal residence is attached to the Affidavit of Plaintiff's counsel and speaks for itself. Clearly this Plan was not proposed in good faith.

The burden is on the Chapter 13 Debtor to establish good faith in the filing of a debt adjustment plan once that good faith is questioned. In Re Belt, 106 B.R. 553 (Bkrtcy.N.D.Ind. 1989).

II. THE PROPOSED PLAN DOES NOT COMPORT WITH 11 U.S.C. §§ 1325 (a)(5), 1325(a)(1) and 506(b).

Pursuant to §§ 1325(a)(5), 1325(a)(1), and 506(b), Debtor must comply with the provisions of Title 11, secured claimants must have accepted the plan, the holder of a secured claim must be allowed to retain its lien, and secured claimants are entitled to interest on the claim. Debtor has not listed Movant as a fully secured claimant, which violates § 506. In turn, by not listing Movant's claim as fully secured, Debtor denies Movant's right to retain its lien, approve the plan and collect interest and costs. Thus, Debtor's Plan does not comport with §§ 1325(a)(5), 1325(a)(1), and 506(b).

III. THE PROPOSED PLAN DOES NOT COMPORT WITH 11 U.S.C. §§ 1322(a)(3) AND 1322(b)(2).

Under 11 U.S.C. §1322(a)(3), the Plan must provide the same treatment for each claim within a particular class. The proposed Plan reduces Movant's secured claim by over 50%, thus giving Movant unequal treatment as compared to other secured claimants.

Under 11 U.S.C. § 1322(b)(2), the debtor may not modify a claim secured only by a security interest in real property that is the debtor's principal residence. The proposed Plan attempts to so modify Movant's claim.

IV. THE PROPOSED PLAN DOES NOT COMPORT WITH SECTION 1325(a)(4).

11 U.S.C. §1325(a)(4) provides that the value of property to be distributed under the Plan for each unsecured claim is not less than the amount that would be received if the estate of the debtor was liquidated. If the Debtor were liquidated, Movant would be entitled to its full secured claim amount plus any interest or costs associated with its mechanic's lien rights. Because Debtor's Plan does not provide for the full amount of, or interest and costs on, Movant's claim, Movant would be better off if Debtor were liquidated.

CONCLUSION

For all of the reasons set forth herein, Suburban Exteriors, Inc. respectfully requests that the Court deny confirmation of Debtors' Chapter 13 plan.

RESPECTFULLY SUBMITTED:

HELLMUTH & JOHNSON, PLLC

Dated: October 6, 2004.

By:_____

David G. Hellmuth, #229131
Blake R. Nelson, #259767
Attorneys for Movant
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
Telephone: (612) 941-4005

UNITED STATES BANKRUPTCY COURT
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AFFIDAVIT OF PLAINTIFF'S COUNSEL

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

Blake R. Nelson, being duly sworn on oath, states as follows:

1. I am an attorney with the law firm of Hellmuth & Johnson, PLLC, attorneys representing Movant Suburban Exteriors, Inc.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Order and Judgment awarding Movant's mechanic's lien claim and verifying Movant's secured claim against Debtor's real property and principal residence.

Dated: October 6, 2004

Blake R. Nelson

Subscribed and sworn to this
6th day of October, 2004.

Notary Public

MARY L. BADENOCH
Notary Public
Minnesota
My Commission Expires January 31, 2005

EXHIBIT "A"

STATE OF MINNESOTA
COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT
HASTINGS, MINNESOTA 55033

In Re: SUBURBAN EXTERIORS, INC., A MINNESOTA CORPORATION
vs. JOHN S. ZOBEL et al.
Case Number: 19-C9-03-008075

BLAKE R NELSON
HELLMUTH & JOHNSON PA
10400 VIKING DR STE 560
EDEN PRAIRIE MN 55344

N O T I C E O F F I L I N G O F O R D E R

You are hereby notified on May 6, 2004 a
ORDER AND JUDGMENT.

was filed in the above entitled matter.

A true and correct copy of this notice has been served by mail upon the parties named herein at the last known address of each, pursuant to the Minnesota Rules of Civil Procedure.

Sue Lawrence, Chief Deputy

By CLB

Dated: May 6, 2004

Deputy

STATE OF MINNESOTA | **DISTRICT COURT**

COUNTY OF DAKOTA | **FIRST JUDICIAL DISTRICT**

CASE TYPE: MECHANIC'S LIEN FORECLOSURE

Suburban Exteriors, Inc., a Minnesota corporation,

Plaintiff,

vs.

John S. Zobel, Claire R. Zobel,
Manufacturers Traders & Trust Company,
a/k/a M & T Mortgage Corporation,
Signal Bank National Association,
Fairbanks Capital Corp.,
XYZ Corporation, ABC Partnership,
John Doe, and Mary Roe,
whose names are unknown to Plaintiff,

Defendants.

Court File No. 19-C9-03-8075
Hon. Robert R. King, Jr.

ORDER AND JUDGMENT.

Whereas Plaintiff Suburban Exteriors, Inc. and Defendants John S. Zobel and Claire R. Zobel entered into an agreement to settle their respective claims against one another, said agreement having been entered into on the record and before the undersigned Judge of Dakota County District Court on March 3, 2004; and

Whereas, the Court entered an Order on March 9, 2004 which memorialized that settlement agreement; and

Whereas, the settlement agreement entered into between the parties allowed any default by Defendants to be proven by Affidavit of counsel for Plaintiff; and

FILED
VAN A. PROCTOR, DAKOTA COUNTY Court Administrator

MAY 06 2004

BY _____ DEPUTY

Whereas, the Court has received such an Affidavit from counsel for Plaintiff, avering that Defendants have defaulted upon the settlement agreement entered into between the parties and are in violation of the Court's Order of March 9, 2004;

Wherefore, the Court hereby makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Defendants John S. Zobel and Claire R. Zobel have failed to pay Plaintiff Suburban Exteriors, Inc. the amount of Fourteen Thousand Dollars ($14,000.00), such payment to be made by cashier's check or by certified check, on or before May 1, 2004.

2. Defendants John S. Zobel and Claire R. Zobel have failed to contact counsel for Plaintiff to inform counsel for Plaintiff of any reason for the failure to pay.

3. Defendants John S. Zobel and Claire R. Zobel are in material and actual breach of the settlement agreement between the parties.

4. Pursuant to the Court's Order of March 9, 2004, the Court has retained jurisdiction to rule on any issues regarding enforcement of the settlement agreement between the parties.

5. Pursuant to the settlement agreement entered into between the parties on the record on March 3, 2004 and the Court's Order of March 9, 2004, Plaintiff is entitle to collect the full amount of its mechanic's lien against Defendants in the amount of $14,780.82, and may conduct a foreclosure sale to enforce its mechanic's lien.

6. Pursuant to the settlement agreement entered into between the parties on the record on March 3, 2004 and the Court's Order of March 9, 2004, Plaintiff is entitled to judgment against Defendants in the full amount of all attorney's fees incurred by Plaintiff in this action and in enforcement of this settlement agreement, along with statutory interest upon the mechanic's lien.

Plaintiff is entitled to immediate entry of this judgment against Defendants John S. Zobel and Claire R. Zobel, and to record this judgment as a lien against the Property.

7. As of May 5, 2004, the total amount of all legal fees and costs incurred by Plaintiff in this action is $15,105.99.

8. As of May 5, 2004, the total amount of interest accrued on the principal of the mechanic's lien held by Plaintiff is $869.84.

9. As of May 5, 2004, the total amount of the judgment against the Defendants, upon which Plaintiff may conduct a foreclosure sale to collect, is $30,756.65.

Based upon the above Findings of Fact and Conclusions of Law, the prior Order entered by the Court on March 9, 2004, and the settlement agreement entered into between the parties on the record on March 3, 2004, along with the pleadings, Affidavits, and file in this matter, the Court hereby enters the following:

ORDER

1. Plaintiff Suburban Exteriors, Inc. is hereby adjudged to have a valid mechanic's lien in the amount of $14,780.82 against the real property owned by Defendants John S. Zobel and Claire R. Zobel, legally described as Lot 10, Block 1 in Kings Wood 2nd Addition, Dakota County, Minnesota, and commonly known as 1434 Kings Wood Road, Eagan, MN 55122 ("the Property"), with interest thereon at the highest rate allowed by law, along with all attorney's fees and costs incurred by Plaintiff in this action and in enforcement of this settlement agreement.

2. Plaintiff is hereby Ordered and directed to conduct a sale of the Property as provided by statute, and to apply the proceeds thereof to the amount adjudged to be due and owing to Plaintiff, which amount, as of May 5, 2004, was $30,756.65.

3. Plaintiff Suburban Exteriors, Inc. is hereby adjudged to have a valid deficiency judgment against Defendants John S. Zobel and Claire R. Zobel for any deficiency which shall remain after applying the proceeds of said sale to the amount adjudged to be due and owing to Plaintiff, along with all of Plaintiff's costs and disbursements incurred herein, including reasonable attorneys' fees, and for statutory interest upon the mechanic's lien against Defendants' Property.

4. Each and every Defendant and all persons, known or unknown, named or not named as Defendants herein, are hereby barred from any equity in redemption or right, title, interest or lien in the Property, except the right to redeem as provided by statute.

5. The Court shall continue to retain jurisdiction to rule on any issues relating to this matter, including confirmation of any foreclosure sale by Plaintiff.

Dated: May 5, 2004

By: Honorable Robert R. King, Jr.
Judge of Dakota County District Court

JUDGMENT

I HEREBY CERTIFY THAT THE ABOVE ORDER CONSTITUTES THE JUDGEMENT OF THIS COURT.

IVAN A. BROSTROM, COURT ADMINISTRATOR

BY: Cheryl Brown DEPUTY

DATED: 5-6-03 (SEAL)

UNSWORN DECLARATION OF PROOF OF SERVICE

I, Mary L. Badenoch, declare under penalty of perjury that on October 6, 2004, I mailed copies of the foregoing Notice of Motion and Motion Objecting to Confirmation of Chapter 13 Plan, Memorandum of Fact, Affidavit of Plaintiff's Counsel and proposed Order Denying Confirmation of Chapter 13 Plan on the individual(s) listed below, in the manner described:

By facsimile:

United States Trustee
612-664-5516

David G. Keller, Esq.
952-454-4232

By first class U.S. mail, postage prepaid:

John S. Zobel
1434 Kingswood Road
Eagan, MN 55122

Jasmine Z. Keller, Chapter 13 Trustee
Thomas E. Johnson
Margaret H. Culp
Chapter 13 General Counsel
310 Plymouth Building
Minneapolis, MN 55402

David G. Keller, Esq.
Grannis & Hauge, P.A.
1260 Yankee Doodle Road, Suite 200
Eagan, MN 55121-2250

Paul A. Weingarden, Esq.
Usset 7 Weingarden, P.L.L.P.
4500 Park Glen Road, Suite 120
St. Louis Park, MN 55416

And I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: October 6, 2004.

/e/ Mary L. Badenoch

s:\Suburban Exteriors\Zobel\Chapter 13 objection to plan.doc

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re: BKY 04-34379 DDO

John S. Zobel,

Debtor. Chapter 13 Case

ORDERING DENYING CONFIRMATION OF CHAPTER 13 PLAN

This matter came before this Court for confirmation of the Chapter 13 plan of reorganization of Debtor(s). Appearances were noted in the record. Based upon the files and records, the Court makes this Order pursuant to the Federal Rules of Bankruptcy Procedure.

IT IS HEREBY ORDERED,

1. Confirmation of the Chapter 13 Plan of Debtor(s) is denied.

Dated: _____

_____
United States Bankruptcy Judge