

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

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In re George L. & Ondrea Lee Gay,                   BKY 3-93-5487

Debtors.

MEMORANDUM ORDER

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This matter came on for hearing on Wednesday, February 16, 1994 on motion for relief from stay by the CIT Group ("CIT"). Appearances are noted in the record. The Court, having received and considered arguments and memoranda of law of counsel, and being fully advised in the matter, now makes this MEMORANDUM ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

FACTS

CIT is an assignee to a retail installment contract and security agreement ("Contract") on a 1987 Rollohome Manufactured Home, 26' x 48', Serial No. R37166AB ("Mobile Home") executed on October 10, 1989 with Robert F. Clawson ("Clawson"). The Contract prohibited transfer of Clawson's interest without the consent of CIT. On September 27, 1991, George and Ondrea Gay ("Debtors") executed a Contract for Deed(FN1) to purchase the Mobile Home from Clawson. See Debtors' Exhibit F attached to the Affidavit of George L. Gay. CIT alleges that Clawson transferred the Mobile Home without CIT's approval.(FN2) The Debtors currently reside in

the

Mobile Home.

On November 22, 1993, the Debtors filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code ("Code"). CIT was duly scheduled as a secured creditor in the case. See Schedule D attached to the Debtors' petition for relief under Chapter 13. A Chapter 13 Plan ("Plan") was filed on the same date and was later confirmed ("Confirmed Plan") on January 14, 1994. The Confirmed Plan's treatment of CIT in relevant parts are:

3. Payments Debtor, or the trustee if so provided below, shall cure defaults within a reasonable time and the debtor shall maintain the payments due while the case is pending on any claim secured solely by a security interest in a mobile home or real property.

5. Additional Provisions (if any): Debtor expects to commence additional employment within the next three months. Additional amounts will be paid to Robert Clawson so as to cure any defaults he owes to CIT Group within nine months of the commencement of the additional employment.

See Plan filed on November 22, 1993. CIT filed this relief from stay motion against the Debtors on February 4, 1994. CIT asserts two bases for the relief from stay motion: CIT claims that it is not a creditor of the Debtors and thus not bound by the provisions

of the Confirmed Plan; and, CIT claims that the Debtors are in default of post-petition payments.

CIT does not dispute that it received notice of the Debtors' Chapter 13 filing and notice of the Plan confirmation date. Essentially, CIT is claiming that it is not bound by the provisions of 11 U.S.C. Section 1327(a)(FN3) because it is not a creditor of the Debtors. CIT argues that it had a Contract with Clawson, and not the Debtors. According to CIT, the Confirmed Plan cannot apply to CIT since the Plan would otherwise validate a transfer that occurred between Clawson and the Debtors, without CIT's approval, which is in violation of the Contract provisions. CIT believes that the Confirmed Plan, if applicable to CIT, would create a contract between CIT and the Debtors where none existed. Accordingly, it argues, that would be an impermissible modification of CIT's rights.

The Debtors argue that CIT is bound by the provisions of the Confirmed Plan pursuant to Section 1327(a) of the Code. CIT received notice of the Debtors' Chapter 13 filing, received notice that CIT was scheduled as a secured creditor, and received notice of the confirmation hearing. CIT did not appear or object to the confirmation of the Plan; nor did CIT appeal the Confirmation Order of January 14, 1994. The Debtors argue that CIT is now attempting to collaterally attack the Confirmed Plan by bringing this motion for relief from stay. The Debtors assert that by the plain language of Section 1327(a) of the Code, and by virtue of case law, a Confirmed Plan is res judicata and therefore, not subject to collateral attack. This is particularly the case since CIT had notice of it's treatment under the Plan and the opportunity to object, but did not.(FN4)

In response to CIT's second basis for relief from stay, the Debtors argue that they are not in default of post-petition payments. According to the Affidavit of Paul W. Bucher, his office forwarded to CIT payments in the form of Money Orders in the amount of \$312.00 on October 25, 1993, November 29, 1993, December 27, 1993 and January 25, 1994.(FN5) See Exhibits A, B, C and D attached to the Affidavit of Paul W. Bucher. In fact, the Debtors claim they have arguably paid in advance of the payment due dates. Payments to CIT are due on the 15th of each month. Since the Chapter 13 was filed on November 22, 1993, the Debtors argue that the first post-petition payment was due on December 15, 1993. The Debtors claim that the November 29, 1993 payment should be considered an early payment for the month of December. Accordingly, the Debtors contend that they are current with their post-petition payments since payments were made for December, 1993, January and February, 1994 in advance of their respective due dates. The Debtors argue that no cause exists for granting relief from stay.

#### DISCUSSION

The term "creditor" is defined as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor...." Section 101(10)(A) of the Code. (Emphasis added). Pursuant to Section 102(2) of the Code, rules of construction, a claim against the debtor includes claim against property of the debtor.... (Emphasis added). Furthermore, a claim is defined as "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured...." Section 101(5)(A) of the Code. Based upon a fair reading of those three provisions, a creditor is one with a claim against the debtor, which includes a

claim against property of the debtor.

CIT is deemed to be a creditor of the Debtors. A creditor is an entity that has a claim against the debtor. The definition of a claim against the debtor includes claim against property of the debtor. Accordingly, a creditor is an entity that has a claim against the debtor which includes a claim against property of the Debtors, the Mobile Home. This claim against the property of the arose prior to the Debtors' Chapter 13 filing since the Contract for Deed was executed on September 27, 1991. While the transfer of the Mobile Home between the Debtors and Clawson was arguably a breach of the Contract, it was not void or ineffective in creating Debtors' interest in the property. CIT falls within the definition of a creditor pursuant to Section 101(10)(A) of the Code.

Since CIT is deemed a creditor of the Debtors, CIT is therefore bound by the provisions of the Confirmed Plan. The effect of a confirmed plan on a creditor is clearly articulated in 11 U.S.C. Section 1327(a), "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected this plan." CIT was duly scheduled in the Debtors' Chapter 13 filing as a secured creditor. CIT received notice of the Debtors filing. CIT also received notice of the confirmation hearing, but failed to attend or object to the Plan. The treatment of CIT's claim under the Plan was clear. CIT was to receive regular post-petition payments with the curing of pre-petition arrearages within a year.

A long line of cases support the res judicata effect of a confirmed plan. An order of confirmation is final, and it precludes a subsequent proceeding attacking illegality of a provision in the plan. Matter of Gregory, 705 F.2d 1118, 1121 (9th Cir. 1983). This is particularly the case when the creditor seeks relief from stay after a plan has been confirmed. 11 U.S.C. Section 1327 is clear, it prevents a creditor from asserting any interest other than what it was provided under the confirmed plan. In re Evans, 30 B.R. 530 (9th Cir. B.A.P. 1983). In fact a mortgagee can be bound by the provisions of a confirmed plan even when the plan violates provisions of 11 U.S.C. Section 1322(b)(2). See Matter of Walker, 128 B.R. 465 (Bankr. D. Idaho 1991).(FN6)

CIT's treatment under the Plan is clear. CIT is to receive regular post-petition payments from the Debtors and pre-petition arrearages are to be paid within a year. CIT is not entitled to relief from stay on grounds that it is not a creditor of the Debtors. Relief from stay would be appropriate only in the event of post-confirmation default. In re Toth, 61 B.R. 160, 166 (Bankr. N.D.Ill. 1986).

While CIT alleged that post-petition default has occurred, the argument is not compelling. The Debtors have made payments to CIT since November 29, 1993. That payment can be viewed as the first post-petition payment for December, albeit early. Subsequent payments in December, 1993, and January, 1994, kept the Debtors current to February, 1994. Presumably, CIT received and accepted those payments.

In summary, CIT is deemed a creditor of the Debtors. As a creditor, CIT is bound by the provisions of the Debtor's Confirmed Plan pursuant to 11 U.S.C. Section 1327(a). The Debtors are not in default of post-confirmation payments. Accordingly, relief from stay is inappropriate in this instance.

#### DISPOSITION

Based upon the foregoing, it is HEREBY ORDERED:

CIT's motion for relief from stay is denied.

By the Court:

Dated: April 12, 1994

DENNIS D. O'BRIEN  
U.S. BANKRUPTCY JUDGE

(FN1) A Contract for Deed was entered into despite the fact that this was not a real property transaction. A reference to a Bill of Sale is made pursuant to paragraph 3(a) of the Contract for Deed. However, that document was not placed into the Record.

(FN2) An additional term was added to the Contract for Deed pursuant to number 20: Seller warrants and represents to Purchasers that he has or will obtain within 60 days the written consent of the CIT Group to this sale. The Court is unable to determine, based upon the Record, whether such approval was actually sought by Clawson.

(FN3) 11 U.S.C. 1327(a) provides that:

Effect of Confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(FN4) According to the Affidavit of Paul W. Bucher, attorney for the Debtors, the day before the confirmation hearing, he spoke with a representative of CIT about the case.

Apparently, Mr. Bucher informed that representative about CIT's treatment under the Plan and the Debtors intention to make regular post-petition payments, and that the pre-petition arrearages be paid within one year. The representative stated, "...he guessed they could live with that." See Affidavit of Paul W. Bucher, page 2.

(FN5) The cover letter accompanying those payments made reference to Robert Clawson, a CIT account number, and identified the Debtors as clients of the law firm.

(FN6) No inference should be drawn from this Opinion regarding confirmability of the Debtors' Plan over an objection, timely raised, by CIT.