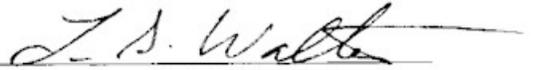


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: July 05, 2005


Lawrence S. Walter
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

In re:

EDWIN W. PENCE
SHARON W. PENCE

Debtors

Case No. 04-41067
Judge Lawrence S. Walter
Chapter 13

**DECISION AND ORDER DENYING DEBTORS' MOTION TO
RECONSIDER/REARGUE AND MOTION TO VACATE**

On March 22, 2005, a hearing was held to consider confirmation of Debtors' proposed plan (docs. 2, 9, 13, 19) and to determine Bank One's Motion Objecting to Confirmation of Chapter 13 Plan (doc. 15) and Renewed Motion Objecting to Confirmation of Chapter 13 Plan (doc. 21) and Debtors' Response to Objection Motion (doc. 20). Debtors' proposed plan contains a special provision treating Bank One's claim, ostensibly secured by a second mortgage on

Debtors' residence, as unsecured, with all payments due under the Bank One loan documents to be paid to the chapter 13 trustee to be held in trust pending resolution of the "predatory lending" suit before the U.S. District Court, Southern District of Ohio, *Pence v. ABN Amro, et al.* 03-02 CV 398 ("Lawsuit"). Following the hearing on this matter, the court sustained the objections of Bank One and denied confirmation of Debtors' proposed plan, primarily because the plan violated 11 U.S.C. §1322(b)(2) and because there is no statutory or case authority for the trust or escrow arrangement proposed by Debtors. The court's corresponding order was entered on March 25, 2005 (doc. 26). Debtors now seek redress from the court's oral decision and corresponding order by means of 1) Debtors' Motion to Reconsider/Reargue Court's Oral Decision Granting Bank One's Objection to Debtors' Chapter 13 Modified Plan (doc. 28) ("Motion to Reconsider"); and 2) Motion to Vacate the Order Sustaining Objections to Confirmation by Bank One Denying Plan and Ordering a Modified Plan (doc. 39) ("Motion to Vacate"). For the reasons set forth below, the Court denies both of Debtors' motions.

Debtors present a variety of arguments as to why this court should reconsider its oral decision granting Bank One's objections to confirmation and correspondingly denying confirmation of Debtors' proposed plan. For clarity, these arguments will be addressed below in the same order and with the same organizational headings as set forth in Debtors' Motion to Reconsider. Fundamentally, however, Debtors' arguments fail because Bank One has a presumptively allowed claim secured by the Debtors' residence and 11 U.S.C. §1322(b)(2) forbids modification of such interests.

First it should be noted that Bank One filed a proof of claim in this case verifying its mortgage interest on January 4, 2005. Debtors have not filed an objection to that claim although they indicated in their special plan provision filed on December 16, 2004 that they would object

to any such claim. Pursuant to 11 U.S.C. §502(a), a filed proof of claim is deemed allowed unless objected to. Also, Debtors list the Bank One mortgage as a secured claim in their schedules without any designation of “disputed, contingent, or unliquidated.” Only in their special proposed plan provision do they set forth the circumstances of rescission, the pending Lawsuit, and their intention to treat the Bank One claim differently. Even in their response to Bank One’s objections to confirmation, Debtors tacitly admit that Bank One is ostensibly a secured claimant until a final judicial determination is made to the contrary. Indeed, Debtors do not dispute that Bank One holds a mortgage of record, properly executed and recorded, and apparently valid in all respects. Instead, they argue that the mortgage was improperly obtained and that they should therefore be allowed to rescind the loan and void the mortgage.

Given these circumstances, the court does not find Debtors’ proposed treatment of Bank One’s mortgage claim to be appropriate or in accordance with the Bankruptcy Code. Simply stated, Bank One holds a secured claim until such time as Debtors obtain an adjudication that the claim is void and they are entitled to redress. Consequently, under the plain language of 11 U.S.C. §1322(b)(2), the bank’s mortgage interest may not be modified by Debtors’ plan unless and until Debtors obtain that adjudication. None of Debtors’ arguments addressed below can overcome the plain mandatory language of this statutory section.

I. Court’s Order Fails to Consider Principles of 11 U.S.C. §361, 362.

Sections 361 and 362 provide for adequate protection where a secured creditor is not allowed immediate relief from the automatic stay to obtain possession of its collateral. Debtors argue that it is contrary to the principles and standards of these sections to require payment to Bank One on a contested claim, and that such payments in effect constitute preferential treatment

of one creditor. Debtors also claim that this court's decision and order improperly restrict Debtors' right to challenge the secure status of Bank One's claim under §506.

The court disagrees. Debtors are attempting to turn the concept of adequate protection on its head. These sections provide protection to the interests of secured creditors who are deprived of their contractual right to repossession or foreclosure and ultimate realization on their security interest upon a debtor's default. Most typically in the chapter 13 context, a mortgagee deprived of its right to foreclose is generally considered adequately protected when a confirmed plan provides regular contractual installment payments plus periodic payments to cure any arrearage. In the instant case, Debtors propose to deny Bank One its right to foreclose and also deny it any payments whatsoever during the pendency of the Lawsuit. Debtors complain of preferential treatment of this creditor, but they are actually urging this court to unfavorably discriminate against this ostensibly secured creditor solely because Debtors have alleged in the Lawsuit that the mortgage should be void. If the court were to accept Debtors' argument, any time a debtor lodges any objection to the validity of a mortgage, the court would have to ignore the facial validity of the mortgage, presume the merits of the objection, and decline to apply 11 U.S.C. §1322(b)(2) according to its plain meaning and contrary to *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993). This the court will not do.

II. Debtors' Claims Under 11 U.S.C. §506(a) and (d) and Relationship to §1322 and §1325.

Debtors maintain that "basic bankruptcy principles" require this court to determine whether Bank One has a secured or unsecured claim, i.e., fully adjudicate the Lawsuit, prior to determining whether their proposed plan is confirmable. More specifically, they argue that precedent in the Sixth Circuit mandates an initial §506(a) analysis of a mortgage interest to ensure that the interest qualifies as secured before denying confirmation of a debtor's plan.

Debtors construe such precedent much too broadly. All of the cases cited by Debtors derive from or interpret *Nobleman v. American Savings Bank*, 508 U.S. 324. That case is of particular importance to the instant proceeding because it is fundamentally at odds with Debtors' attempts to modify Bank One's mortgage interest and strongly supports this court's adherence to the plain unequivocal language of §1322(b)(2) forbidding modification of a mortgage on a debtor's residential real estate. In *Nobleman*, the Supreme Court held that the plain language of §1322(b)(2) prevents a debtor from stripping off the lien of a partially secured mortgagee. The cases cited by Debtors address only the issue of whether *Nobleman* and §1322(b)(2) preclude stripping down a mortgage that is completely unsecured following a §506(a) analysis. See, *In re Phillips*, 224 B.R. 871, 872 (Bankr. W.D. Mich. 1998); *Ernst v. Bank One (In re Ernst)*, 270 B.R. 707, 708-709 (Bankr. S.D. Ohio 2001). In notable contrast to the instant case involving complex and hotly contested issues, in these cases the requisite §506(a) analysis is quick, the operative values easily ascertainable, and there is little or no delay in payment to the holder of a secured claim. The *Phillips* and *Ernst* cases do not hold or in anyway support the proposition that all secured claims subject to objections or lawsuits must be fully determined before the protection of §1322(b)(2) is effective; nor do they suggest that the court may not approve or deny confirmation of a plan until it has first adjudicated the objections raised by debtors to an apparently valid mortgage and allowed secured claim.

III. Compliance With Intent and Purpose of §1322 Plan Contents as to Secured Claims.

Citing *In re Davis*, 989 F.2d 208, 210 (6th Cir. 1993), Debtors point to the legislative history of Chapter 13 and, specifically, §1322(b)(2) with respect to encouragement of private home ownership and suggest that their plan comports with the intent and purpose of the statute. While the *Davis* case does indeed articulate the legislative intent, it does not support Debtors'

position because it comes down firmly on the side of “plain meaning” and holds that non-enabling loans at very high interest rates are protected from modification despite the legislative history:

Relying upon legislative history, the debtor argues that the statute should not be read to protect finance companies specializing in short-term financing, because those creditors are not within the class of traditional, residential mortgageholders which Congress intended to protect. “[R]esort to legislative history for interpretation is improper when a statute is unambiguous.” *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597, 600 (6th Cir.), cert. denied, 500 U.S. 959, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991). As noted by the courts below, the language of § 1322(b)(2) is clear and unambiguous on its face and does not permit the interpretation that the statute has application only to “enabling loans.”

In re Davis, 989 F.2d at 210. Given the plain and unambiguous language of the statute, the intent must be interpreted more broadly to mandate payment of mortgages on residences without modifications other than those specifically delineated in the Bankruptcy Code. Given that intent, it would be contrary to presume a mortgage to be invalid until the completion of a lawsuit, and the unequivocal language of the statute compels the court to resolve any doubts in favor of the mortgage holder.

Debtors also erroneously argue that courts in this circuit, such as the court in *In re Jones*, 152 B.R. 155, 168 (Bankr. D. Mich. 1993), have recognized legislative intent in following the majority opinion allowing bifurcation and strip down of secured overvalued junior liens. But Debtors fail to recognize that the *Jones* decision and those in accord with it were effectively reversed by *Nobleman v. American Savings Bank*, 508 U.S. 324. In fact, many of Debtors’ arguments ignore the plain language of §1322(b)(2) as well as the holding and rationale of *Nobleman*. The Supreme Court in *Nobleman* carefully examined the language of §1322(b)(2) and the rights protected by that section:

This interpretation fails to take account of § 1322(b)(2)’s focus on “rights.” That provision does not state that a plan may modify “claims” or that the plan may not

modify “a claim secured only by” a home mortgage. Rather, it focuses on the modification of the “*rights of holders*” of such claims.

* * *

The bank’s “rights,” therefore, are reflected in the relevant mortgage instruments, which are enforceable under Texas law. They include the right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against petitioners’ residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure.

Nobleman v. American Savings Bank, 508 U.S. at 329. This language strongly suggests that §1322(b)(2) prohibits any modification of a bank’s contractual rights under its note and mortgage, including, fundamentally, the right to receive installment payments in accordance with the note. Debtors’ proposal interposing an escrow in place of the present receipt of funds must be viewed as a curtailment of the bank’s contractual rights and therefore a prohibited modification under this statutory provision.

IV. Consideration of §1322(e) Criteria.

While Debtors acknowledge that neither case law nor legislative history support their position, they nevertheless argue that the literal language of 11 U.S.C. §1322(e)¹ allows them to factor into their treatment of Bank One’s claim “applicable nonbankruptcy law” such as TILA statutory rescission and damage provisions. Because these statutory provisions might convert the bank’s claim from secured to unsecured or at least reduce the deficiency claim, they urge the court to confirm their proposed plan and allow final adjudication of the Lawsuit prior to requiring any payments to the bank.

The court disagrees with Debtors’ reading of §1322(e). The section only applies where there is a plan that proposes to cure a default and it focuses solely on how to calculate the appropriate cure amount.

¹ Section 1322(e) of the Bankruptcy Code reads: “Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.”

It does not modify §506(a) pertaining to determination of secured status, but modifies §506(b) pertaining to the inclusion in a secured claim of interest, and any reasonable fees, costs, or charges provided by the applicable contract. Debtors are attempting, through their Lawsuit, to rescind their mortgage, render the claim unsecured, or dramatically reduce it. Calculation of the arrearage amount is only a marginal part of this endeavor. Even if, *arguendo*, the phrase “applicable nonbankruptcy law” included TILA and similar statutes, section 1322(e) still provides no justification for confirming a plan that provides for no commencement of regular monthly mortgage payments. In fact, the scope of “applicable nonbankruptcy law” in the context of this statutory section is undefined. Given that ambiguity, some resort to legislative history would be necessary and, as pointed out by Debtors, it is abundantly clear from that history that the section was promulgated to overrule *Rake v. Wade*, 508 U.S. 464 (1993) to prevent payment of interest on mortgage arrearages. There is no legislative history favoring Debtors’ interpretation.

V. Statutory Right of Rescission Under TILA and TILA Claim as a Core Proceeding or Directly Related Proceeding.

Debtors argue that their proposed withholding of mortgage payments to the bank by means of an escrow or trust arrangement is more in keeping with the purpose of TILA in that TILA rescission voids the loan and related security interest immediately upon exercise of the rescission right. They place considerable reliance upon the reasoning of *Quenzer v. Advanta Mortgage Corp., et. al. (In re Quenzer)*, 266 B.R. 760 (Bankr. Kan. 2001), *reversed*, 288 B.R. 884 (D. Kan. 2003), but admit that courts are far from unanimous. In fact, the reversing court in *Quenzer* held that a court may condition the voiding of a creditor’s mortgage upon equitable terms, including the condition that the debtor first return the loan proceeds received in connection with the transaction. *Quenzer v. Advanta Mortgage Corp.*, 288 B.R. 884, 889 (D. Kan. 2003). Another notable distinction between the *Quenzer* case and the instant case is that the financial institution in *Quenzer* admitted the TILA violation whereas Bank One apparently contests this point and all other aspects of the Debtors’ rescission claim. Consequently, and contrary to Debtors’ arguments, the

factual basis for Debtors' rescission is disputed and the legal effect of rescission is far from clear. Because the facts in this case are in dispute and because *Quenzer's* reversal calls into question the legal effect of a rescission, Debtors' reliance on *Quenzer* is misplaced. Debtors have not persuaded the court that their proposed special plan provision complies with either the purpose behind TILA or the requirements of the Bankruptcy Code.

VI. Equitable Considerations.

In their final argument, Debtors reference vaguely defined equitable considerations essentially grounded in the presumed liability of Bank One and a policy favoring protection of the rights of victims such as Debtors against the predations of such mortgage lending programs. However, even if the court were to accept these presumptions and acknowledge the applicability of the equitable considerations, the plain language of §1322(b)(2) cannot be ignored. Equity cannot trump the mandate of a clear and unequivocal statute.

VII. Conclusion.

For all of the foregoing reasons, Debtors' Motion to Reconsider and Motion to Vacate are denied.

SO ORDERED.

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