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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) Case No. 94-51318
)
SALLIE J. DARBY) Chapter 13
)
Debtor) JUDGE MARILYN SHEA-STONUM
)
) **DECISION AND ORDER**

This matter is before the Court on the motion of the Debtor, Sallie Darby, to confirm her Chapter 13 Plan (the "Plan"). The Plan includes as a primary source of income rent from a four unit apartment building located in Cleveland, Ohio as to which Debtor is an assignee of the vendee under a land installment contract (the "Contract"). John Hairston, the vendor under that Contract, has objected to the confirmation of the Plan on the grounds that (1) the Contract is an executory contract which the Plan impliedly assumes without the immediate cure of existing defaults, as required by 11 U.S.C. §365(b)(1)(A); and (2) the Debtor has failed to remain current even on a post-petition basis on the payments owing under the Contract, thereby calling into question any assurance of future performance under the Contract, as required by 11 U.S.C. §365(b)(1)(C). For the reasons set forth below, this Court sustains the vendor's

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objection to the confirmation of the present Plan.

Because land installment contracts serve, in part, as financing devices in property transfers, bankruptcy courts have struggled with the question of whether they are the functional equivalent of a mortgage, meaning that vendors would be entitled simply to the status of a secured creditor with respect to the underlying real estate, or whether they must be analyzed under the executory contract provisions of the Bankruptcy Code, 11 U.S.C. §365. See, e.g., In re Booth, 19 B.R. 53 (Bankr. D. Utah 1982); In Re Johnson, 75 B.R. 927 (Bankr. N.D. Ohio 1987).

This precise dilemma was addressed by the Sixth Circuit in In re Terrell, 892 F.2d 469 (6th Cir. 1989). In that Chapter 12 case, the Sixth Circuit overruled a finding by the bankruptcy court that had been affirmed by the district court that the Chapter 12 debtor could treat the vendor under a Michigan land installment contract as having simply the rights of a mortgage holder. In that case, the debtors alleged that the value of the underlying property was substantially less than the amount outstanding under the land installment contract and thus sought to value the vendor's lien rights under 11 U.S.C. §1225(a)(5).

In Terrell, the Sixth Circuit explicitly overruled In re Britton, 43 B.R. 605 (Bankr. E.D.Mich. 1984), which the panel recognized as representing the position that had been adopted by the majority of bankruptcy courts in the Sixth Circuit. Specifically, the Britton court had determined that Michigan land installment contracts were not executory, at least when the vendee filed for bankruptcy. The Terrell court gave further direction in dealing with the

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intersection of state law concerning land installment contracts and the treatment of such contracts in federal bankruptcy proceedings of the vendee when stating: "The parties have spent a considerable amount of time discussing the extent to which state law governs the definition of executory contracts. We believe the Ninth Circuit has formulated a useful and workable answer to this question, holding that federal law defines the term executory contract but that the question of the legal consequences of one party's failure to perform its remaining obligations under a contract is an issue of state contract law." 892 F.2d at 471. Therefore it is appropriate in this case to look at the treatment of land installment contracts under Ohio law.

Since the Terrell decision, the only reported decision dealing precisely with the issue of the intersection of Ohio land installment contracts and §365 of the Bankruptcy Code is In re Raby, 139 B.R. 833 (Bankr. N.D.Ohio 1991). In that case, over the objection of the vendor of a land installment contract dealing with property in Sandusky County, Ohio, Judge Speer found that the Chapter 7 Trustee was entitled to assume the land sales contract provided that he fully perform the economic obligations due under that contract. The bankruptcy court noted that the inclusion in the Raby land installment contract of a provision prohibiting prepayment of the principle was not a basis for prohibiting the trustee's assumption of the land sales contract, presumably to be followed by a sale of the underlying real estate, with prepayment of the principle to the vendor.

Prior to the Terrell decision, Judge Harold F. White of this Court catalogued the consequences of performance and non-performance by vendors and vendees under Ohio land contracts in In re Johnson, 75 B.R. at 929-30:

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Ohio has enacted legislation to govern the creation and operation of the land installment contract; it is defined as

an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation. Option contracts for the purchase of real property are not land installment contracts.

Ohio Rev. Code Ann. §5313.01(A)(Anderson 1981) (emphasis added). Each land installment contract must conform with the "formalities required by law for the execution of deeds and mortgages," Id. at §5313.01(D), and must be recorded by the vendor within 20 days after its execution; Id. at §5313.01(C). See also, Ohio Rev. Code Ann. §5301.25(A) (Anderson Supp. 1986). If the vendee has paid a sum equal to, or in excess of 20 percent of the purchase price, or has paid in accordance with the terms of the contract for five years, the vendor may recover possession of the property only by use of proceedings for foreclosure and judicial sale. Cuyahoga Metropolitan House Authority v. Watkins, 28 Ohio App.3d 20, 491 N.E.2d 701 (1984). The vendor retains legal title and the vendee does not take legal title to the subject property until he or she has performed all the obligations under the contract. Blue Ash Building & Loan Co. v. Hahn, 20 Ohio App.3d 21, 23, 484 N.E.2d 186 (1984). The vendor may not place a mortgage on the property in excess of the balance due by the vendee without his or her consent. Ohio Rev. Code Ann. at §5313.02(B).

The statutory language clearly describes the vendor's retention of title "as security for the vendee's obligation" to pay the balance of the installment payments under the land contract. The vendee "stands as an equitable owner of property sold under the contract." 20 Ohio App. at 21 (Syllabus Para. 2). In an unreported decision of an Ohio appellate court which held that a judgment lien of the vendor's creditor is subordinate to the vendee's interest, the court described the rights of the parties to a land [contract] as

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follows:

Both the vendor and purchaser have a beneficial interest in property which is the subject matter of a land contract. Cogshall v. Marine Bank Co., (1900), 63 Ohio St. 88; In Re Appropriation of Land for Highway Purpose, (1962), 118 Ohio App. 207. The vendor holds more than naked title; he may mortgage his interest, up to the amount of the balance due, without the consent of the purchaser. R.C. 5303.02(B). The land contract vendor's interest consists of two parts, a right to payment of a sum of money and an interest in the land which declines in value with each payment. The vendor also has the rights of forfeiture if the purchaser defaults. Although a judgment creditor may intercept the payments by attachment of garnishment, only this declining interest in the land is subject to foreclosure on a judgment lien as "lands and tenements" under R.C. 2329.02.

Myers v. Parsley, No. 85 CA 9 (Ohio 4th Dist.Ct. App. March 14, 1986) [Available on WESTLAW, OH-CS database] (LEXIS Ohio library, Cases file).

In light of the foregoing, and the undisputed failure of the debtor to make payments as scheduled under the land installment contract, both prior to and following the filing of her Chapter 13 case, this Court finds that the vendor's objection to the confirmation of the present plan should be sustained. The Court notes, however, that the vendor has not yet sought any relief from the automatic stay which is still in place pursuant to 11 U.S.C. §362(a).

At the adjourned hearing on the confirmation of the debtor's plan, held on December 12, 1994, tenants residing in the subject apartment building testified concerning the absence of heat and electricity in at least one unit in the building. Based upon this testimony, the Court also finds that a further, independent

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reason to deny confirmation of the current plan exists in the failure of the debtor to demonstrate to the Court her compliance with 11 U.S.C. §1325(a)(6). That provision requires the Court to address the prospect that all payments proposed under the Plan will be made and that the debtor will be able to comply with the Plan. The evidence in this case to date does not support such a finding.

THEREFORE, the debtor's motion for confirmation of her Chapter 13 Plan is hereby denied.

IT IS SO ORDERED.

Marilyn Shea-Stonum
Bankruptcy Judge

DATED: 1/19/95