The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: July 07 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 04-38364
	)	
Katrina Renee Lhamon,	)	Chapter 13
	)	
Debtor.	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER

Katrina Renee Lhamon ("Debtor") is before the court on the Chapter 13 Plan that she filed on December 10, 2004, as amended by the Stipulated Order Amending Chapter 13 Plan entered in this case on March 29, 2005 (the "Plan"), and Bank One National Association, as trustee for ARC 2001-BC6 Trust (the "Bank"), is before the court on its Objection to Confirmation of Plan filed in this case on January 7, 2005 (the "Objection"). After considering the Plan, the Objection, the parties' Stipulation of Facts [Doc. #32] and their briefs, and after hearing the arguments of counsel, the court will sustain the Bank's objection and deny confirmation of the Plan but will afford Debtor an opportunity to amend the Plan.

FACTS AND PROCEDURAL BACKGROUND

Debtor filed her voluntary petition commencing this case on October 5, 2004. As of the commencement of her case, Debtor was the owner of an undivided ½ interest in real property located at 6850 Ottawa Road, Lima, Ohio (the "Property"), with the legal description as set forth in paragraph 6 of the parties' Stipulation of Facts. The Property is owned jointly by Debtor and her spouse, Todd Lhamon, who is not a codebtor in this case. The address for Debtor set forth on her petition is the Property address. Bank is the holder of a mortgage that is the first and best lien on the Property (subject to real estate taxes).

On November 23, 2004, the Bank timely filed a proof of claim. On April 27, 2005, the Bank's agent filed an amended proof of claim, asserting a claim in the amount of $288,804.42 and that the claim is secured by a mortgage on the Property. The claim amount includes arrearages totaling $73,831.95. Attached to the proof of claim are copies of the promissory note and the mortgage. The parties have stipulated that only Todd Lhamon executed the promissory note in favor of the Bank's predecessor in interest and that both Debtor and her spouse signed the mortgage. The note provides for payments of $2,196.89 per month, with a maturity date of June 1, 2031, and for interest at a rate of 11.850% *per annum*. As of the commencement of this case, the parties have stipulated that the principal balance due and owing from Todd Lhamon was $214,972.47, with interest thereon from September 1, 2002, plus unspecified escrow advances.

The parties have stipulated that the Property has a total value of $213,600.00. Notwithstanding the parties' stipulated value, the Plan represents that the Property value is $175,000. Because real property taxes of $2,863.26 have priority over the mortgage, the Plan proposes to treat the Bank's claim as a secured claim to the extent of $172,136.74. Debtor proposes to pay that secured value, with interest at the rate of 7% *per annum*, in monthly installments of $1,175.00 each.[1]

The Bank's Objection asserts that, under 11 U.S.C. § 1322(b)(2), the court may not confirm a plan that modifies the Bank's rights. The court commenced a hearing on confirmation of the Plan on April 12, 2005, and continued the hearing on June 21, 2005. On May 12, 2005, Debtor filed the parties'

[1] According to the court's computations, at the rate of $1,175 per month, it would take approximately 326 months (over 27 years) to pay the Bank the alleged secured claim with interest.

Stipulation of Facts and her brief in support of confirmation. The Bank filed a brief in support of its Objection on May 26, 2005. The court is presently scheduled to conclude the confirmation hearing on July 26, 2005.[2]

LAW AND ANALYSIS

Section 1322(b)(2) Applies.

The court will first address whether and, if so, how 11 U.S.C. § 1322(b)(2) applies in this case. That statute contains a general prohibition against modifying "a claim secured only by a security interest in real property that is the debtor's principal residence." Under applicable Supreme Court authority, there is no question that the debt to the Bank constitutes a "claim." That term is defined to mean a "right to payment, whether or not such right is . . . secured, or unsecured" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is . . . secured, or unsecured." 11 U.S.C. § 101(5). Moreover, "'claim against the debtor' includes claim against property of the debtor." *Id.* § 102(2). The Supreme Court has made clear that this language compels the conclusion that debts that are secured by property of the debtor but with respect to which the creditor has no *in personam* rights against the debtor constitute "claims against the debtor": "A fair reading of § 102(2) is that a creditor who, like the Bank in this case, has a claim enforceable only against the debtor's property nonetheless has a 'claim against the debtor' for purposes of the Code." *Johnson v. Home State Bank*, 501 U.S. 78, 85, 111 S. Ct. 2150 (1991). Accordingly, Debtor's obligation to the Bank constitutes a "claim." It is also a claim "secured by a security interest in real property that is the debtor's principal residence," as the collateral for the loan is the Property at which Debtor and her spouse reside.

Debtor contends, however, that the claim is not secured "only" by her residence, since the collateral includes 17 acres apparently adjoining the one-acre lot on which the home is located. This argument is contrary to binding precedent. In *Federal Land Bank of Louisville v. Glenn (In re Glenn)*, 760 F.2d

[2] The court notes that the Chapter 13 Trustee has since filed a motion to dismiss this case for want of prosecution by the Debtor.

1428 (6th Cir. 1985), the court held that § 1322(b)(2) applied to the debtors' residence and the 50 acres of farmland surrounding it as a single unit. The Sixth Circuit adopted the reasoning of a Virginia bankruptcy court "that 'in the absence of a showing that the Debtors clearly use the farm for any principal purpose other than their residence, [this court] must consider the entire . . . property as their principal residence.'" *Id.* at 1441 (quoting *In re Ballard*, 4 B.R. 271, 276 (Bankr. E.D. Va. 1980)). As in *Glenn*, since Debtor in this case has not offered any evidence that she "put[s] the land to any other use, it is difficult to see why the land should be found to be anything but a part of [her] residence for the purposes of Chapter 13." *Id.*; *see In re Dinsmore*, 141 B.R. 499, 505 (Bankr. W.D. Mich. 1992) (modification is not permitted unless "the overall use of the property securing the creditor's claim goes beyond the protection of § 1322(b)(2)").[3]

Section 1322(b)(2) Applies to All of the Bank's Rights with Respect to the Loan.

For the foregoing reasons, the Bank is a "holder[] of a . . . claim[] secured only by a security interest in real property that is the debtor's principal residence." Thus, § 1322(b)(2) applies and generally prohibits Debtor from modifying the Bank's rights. Debtor argues that, since she has no personal liability to the Bank, its "rights" consist solely of its secured claim: "the 'rights,' enforceable under Ohio law against the debtor would simply be the foreclosure of its mortgage interest against the Debtor's interest and is therefore as a matter of law limited to the value of the property." (Br. of Debtor in Supp. of Confirmation of the Plan, at 4.) Again, the Supreme Court has rejected that position. In *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106 (1993), the Court held that § 1322(b)(2) prohibits the "stripping down" of a secured creditor's claim, treating the claim as secured to the extent of the value of the collateral and unsecured for the balance. Rather, the Court made clear that the statute forbids the modification of

[3] In asserting that the fourteen acres of woods and three acres of "residual" property are separate from the one-acre parcel on which her home is located, Debtor relies on the Allen County Auditor's Office information respecting the property. *See* Exhibits C, D and E to Stipulation of Facts. Irrespective of the nature of the adjoining land, however, this court finds, in accordance with the *Glenn* case, that the surrounding land serves a residential purpose, even if only as a buffer zone. That finding is supported by the facts that Debtor's schedules do not disclose the adjoining land separately from the residential Property, and that a mortgage on all of the Property was conveyed to the Bank's predecessor in interest by a single instrument containing a single legal description.

rights of holders, not *claims*. Once the bankruptcy court determines that the creditor is a "holder of a claim secured by a lien on [debtor]s' home," the rights of that creditor are sacrosanct. *Id.*, 508 U.S. at 328-29. The Supreme Court expressly rejected the contention that "the 'rights' the bank enjoys as a mortgagee, which are protected by § 1322(b)(2), are limited by the valuation of its secured claim." *Id.* at 329. The Court continued:

> Petitioners propose to reduce the outstanding mortgage principal to the fair market value of the collateral, and, at the same time, they insist that they can do so without modifying the bank's rights "as to interest rates, payment amounts, and [other] contract terms." That appears to be impossible. The bank's contractual rights are contained in a unitary note that applies at once to the bank's overall claim, including both the secured and unsecured components. Petitioners cannot modify the payment and interest terms for the unsecured component, as they propose to do, without also modifying the terms of the secured component. Thus, to preserve the interest rate and the amount of each monthly payment specified in the note after having reduced the principal to $23,500, the plan would also have to reduce the term of the note dramatically. That would be a significant modification of a contractual right. . . . There is nothing in the mortgage contract or the Code that suggests any basis for recalculating the amortization schedule–whether by reference to the face value of the remaining principal or by reference to the unamortized value of the collateral. This conundrum alone indicates that § 1322(b)(2) cannot operate in combination with § 506(a) in the manner theorized by petitioners.
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> In other words, to give effect to § 506(a)'s valuation and bifurcation of secured claims through a Chapter 13 plan in the manner petitioners propose would require a modification of the rights of the holder of the security interest. Section 1322(b)(2) prohibits such a modification where, as here, the lender's claim is secured only by a lien on the debtor's principal residence.

Id. at 331-32 (citation omitted). Since the Supreme Court, in *Johnson*, also held that the holder of a secured claim without personal recourse against the debtor holds a "claim against the debtor," *Nobelman* is equally applicable where the debtor has no personal liability for the debt. Accordingly, none of the Bank's rights with respect to the secured obligation may be modified. Those rights include the right to full

payment of the debt in accordance with the terms of the promissory note, and the right to retain the mortgage until such payments have been completed.[4]

Cases decided after the decision in *Nobelman* so hold. For example, in *In re Dydo*, 163 B.R. 663 (Bankr. D. Conn. 1994), the debtors had no personal liability to the bank because that liability had been discharged in a previous Chapter 7 case. They proposed a Chapter 13 plan whereby the bank would receive payment of the value of the collateral over the 60-month term of the plan. The court denied confirmation under § 1322(b)(2) and *Nobelman*:

> The debtors' argument that *Nobelman* only applies to mortgage debts where personal liability on the entire debt obtains is not supported by any of the language in the *Nobelman* opinion. A careful review discloses no mention by the Court of distinctions based upon whether the debtors are personally liable on the mortgage debt. The Court plainly ruled that the "'rights' the bank enjoy[ed] as a mortgagee, which are protected by § 1322(b)(2), are [not] limited by the valuation of its secured claim . . . . The bank's contractual rights are contained in a unitary note that applies at once to the bank's overall claim, including both the secured and unsecured components."
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> The debtors rely solely on the Supreme Court's ruling in *Johnson v. Home State Bank* . . . to support confirmation of their Chapter 13 plan. . . . The Johnson case contains no reference to § 1322(b)(2), and I find that holding inapposite in the present proceeding.
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> In light of the *Nobelman* ruling, I conclude that the debtors' Chapter 13 plan proposes to modify the rights of Citicorp as the holder of a first mortgage secured only by the debtors' principal residence. Such modification is prohibited by § 1322(b)(2). Accordingly, confirmation of the plan must be, and hereby is, denied.

Id. at 664-65; *accord*, *Parker v. Fed. Home Loan Mortgage Corp.*, 179 B.R. 492, 495 (E.D. La.) ("There is simply no support for the debtor's argument that the discharge of his personal liability, if it in fact occurred, allows him to reduce the mortgagee's claim to the fair market value of the property."), *appeal*

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[4] Debtor suggests that the terms of the note do not control the Bank's rights vis-à-vis Debtor, because she signed only the mortgage and not the note. The court points out, however, that the mortgage obligates the "Borrower" – defined to include both mortgagors – to "promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note." Accordingly, Debtor's obligation on the mortgage is coextensive with her spouse's obligation on the note.

dismissed, 70 F.3d 1269 (5th Cir. 1995); *Gelletich v. Household Realty Corp. (In re Gelletich)*, 167 B.R. 370, 378 (Bankr. E.D. Pa. 1994). The present case is indistinguishable from *Dydo* and its progeny, so the result must be the same.

The Plan May, but Does Not, Modify the Bank's Rights Under § 1322(b)(5).

Since the Bank's mortgage is in default, it would seem to be impossible for a Chapter 13 plan not to modify the Bank's rights as a plan could not provide for payment of the debt as and when due. *See PNC Mortgage Co. v. Dicks*, 199 B.R. 674, 683 (N.D. Ind. 1996) ("deacceleration and reinstatement of the original mortgage terms arguably are modifications within the meaning of § 1322(b)(2)"). However, Section 1322(b)(5) of the Bankruptcy Code provides:

> Subject to subsections (a) and (c) of this section, the plan may . . . notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due . . . .

Section 1322(b)(5) is, therefore, either an exception to the "no modification of home mortgages" rule set forth in § 1322(b)(2), *see Nobelman*, 508 U.S. at 330, or a clarification that the curing of the default and reinstatement of the mortgage does not constitute a "modification" within the meaning of that statute. Under § 1322(b)(5), the Plan must provide for the curing of the $73,831.95 default within a reasonable time and for ongoing monthly postpetition maintenance payments of $2,196.89 per month. The Plan does not so provide, so confirmation must be denied.[5]

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[5] Even if § 1322(b)(2) were inapplicable, the court could not confirm the Plan. In that event, Debtor would have three choices. First, the Plan could provide for the curing of the default and reinstatement of the mortgage under § 1322(b)(5), because such a treatment is available whenever "the last payment is due after the date on which the final payment under the Plan is due," not just when the loan falls within § 1322(b)(2). Second, the Plan could provide that "the value, as of the effective date of the plan, of property to be distributed under the Plan on account of such claim is not less than the allowed amount of such claim," i.e., the plan could satisfy the secured claim, with interest, over the term of the Plan. 11 U.S.C. § 1325(a)(5)(B). Third, the Plan could provide for the surrender of the Property to the Bank. *Id.* § 1325(a)(5)(C). As noted above, the Plan does not comply with § 1322(b)(5). Nor does it comply with § 1325(a)(5)(B), which, according to the court's calculations, would require payments of approximately $5,100 per month, using the Plan's 48-month term and 7% interest rate and the $213,600 secured claim

THEREFORE, for the foregoing reasons,

IT IS ORDERED that the Objection [Doc. #14] is sustained and confirmation of the Plan [Doc. #s 12 & 25] is denied, and it is

FURTHER ORDERED that Debtor shall have 28 days within which further to amend the Plan to provide a treatment of the Bank's claim consistent with this opinion, and it is

FURTHER ORDERED that the continued confirmation hearing in this case, scheduled for July 26, 2005, is vacated.

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amount to which the parties have stipulated. Finally, of course, the Plan does not provide for the surrender of the Property. Accordingly, the Plan is not confirmable irrespective of whether § 1322(b)(2) applies.