

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 03-18895
)
GARY A. DVORSCAK and) Chapter 13
RUTH ANN DVORSCAK,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **MEMORANDUM OF OPINION**

Green Tree Servicing, LLC moves for relief from stay to permit it to exercise its legal rights with respect to the debtors’ real property located at 3701 Edgewater Drive, Vermilion, Ohio and the debtors Gary and Ruth Ann Dvorscak object. The parties submitted the issue for decision on stipulated facts and briefs. (Docket 36, 41, 42, 43). For the reasons stated below, Green Tree’s motion for relief from stay is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(G).

FACTS

The debtors and Green Tree stipulate to these facts:

“1. On November 18, 1997, Gary Dvorscak and Ruth Ann Dvorscak borrowed \$71,400.00, with interest at 10.49%, from Star Bank, N.A. The loan was ultimately assigned to Green Tree Financial Servicing Corp. (“Green Tree”). The loan was evidenced by a mortgage and balloon note, both dated November 18, 1997. The mortgage granted a lien on debtors’

residence; real property owned by the debtor, and known as 3701 Edgewater Dr., Vermilion, OH 41089. A copy of the mortgage and balloon note was attached to Green Tree's Motion for Relief and filed with this court on March 9, 2005.

2. The monthly payment amount under the terms of the note is \$652.59. The original maturity date of the balloon note was December 1, 2004. Any amount still owing on the note on December 1, 2004 was to be paid in full on that date.

3. On May 16, 1998, the parties entered into a written extension agreement whereby the maturity date of the loan was extended from December 1, 2004 to March 1, 2005.

4. The debtors filed their Chapter 13 bankruptcy case and plan on July 8, 2003.

5. The debtors' plan provided for the debtors to pay Green Tree current monthly payments directly outside the plan, with payments to the chapter 13 trustee of \$712 per month. The plan provided for pre-petition arrearages to be paid inside the plan by the Trustee.

6. Green Tree objected to confirmation of the plan on August 28, 2003 stating as grounds for the objection that, 'the plan does not provide for the curing of arrearages within a reasonable time, which arrearages are in the sum of \$21,961.70.' The Trustee interlineated the plan to cure arrearages in the amount of \$21,961.70 at the hearing held on October 14, 2003. The parties resolved the objection by agreed order entered November 18, 2003, whereby the debtor agreed to cure arrearages in the amount of \$21,324.20. The entered agreed order inadvertently cited the arrearage as \$17,620.20 and not \$21,324.20.

7. On March 7, 2005, the parties signed an amended agreed order resolving the objection by correcting the pre-petition claim amount to \$21,324.20.

8. After the filing of the bankruptcy case, the debtors tendered post-petition monthly payments to Green Tree through the February 2005 payment.

9. On February 26, 2005 and March 28, 2005, the debtor made payments individually in the amount of \$652.00. (The actual monthly payment amount is \$652.59). Green Tree accepted the payments and applied them towards the balance due on the balloon note.

10. On April 26, 2005 and May 27, 2005, the debtor executed checks in the amount of \$652.00 each, both payable to Green Tree Financial. Green Tree has not negotiated the checks and has not applied these funds to [debtors'] account.”

(Docket 44).

Additionally, the court notes that the debtors' confirmed plan is anticipated to run 41 months. (Docket 27).

DISCUSSION

This dispute is a variation on the standard relief from stay situation where the debtor agrees to make monthly mortgage payments to the lender throughout the life of the plan and then allegedly fails to do so. Here, the note signed prepetition by the debtors obligated them to make a balloon payment on March 1, 2005. They did not do so and do not have the funds to do so. The question is whether the confirmed plan modified the debtors' obligation to make that payment.

The debtors maintain that the plan extends the maturity date of the balloon note to the date that Green Tree's arrearages are paid in full under the plan. If so, the debtors are not in default of any obligation and relief from stay is not appropriate. Green Tree's position is that the

plan does not modify the note. Under this approach, since the balloon payment was not timely made, the debtors do not have the funds to make the payment, and there is no equity in the property, relief from stay should be granted.

A. 11 U.S.C. § 1322(c)(2)

Section 1322(b)(2) prohibits the debtor from modifying a claim which is secured solely by a debtor's principal residence. *See* 11 U.S.C. § 1322(b)(2). This provision "typically forces Chapter 13 debtors to provide for a home mortgage by curing defaults and maintaining payments during the life of the plan as permitted by 11 U.S.C. § 1322(b)(5)." Keith M. Lundin, Chapter 13 Bankruptcy § 118.8 (3d ed. 2000 & 2004 Supp.).

There is an exception to this rule when the final payment on the home mortgage is due before the final plan payment:

(c) Notwithstanding subsection (b)(2) and applicable non-bankruptcy law –

* * *

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

11 U.S.C. § 1322(c)(2). This provision was available to the debtors as a means of dealing with their obligation to Green Tree because their debt to Green Tree is secured solely by their residence, their last payment to Green Tree was due on March 1, 2005, and their plan payments to Green Tree were expected to run beyond that date. The parties disagree as to whether the debtors' confirmed plan employed this provision to extend the balloon payment date to the date

that the arrearages are paid in full under the plan. For these purposes, the debtors' plan is basically construed as a contract. *See Linsenmeyer v. United States (In re Linsenmeyer)*, 92 Fed. Appx. 101, 102 (6th Cir. 2003) and *Guardian Savings and Loan Assoc. v. Arbors of Houston Assocs. Ltd. P'ship (In re Arbors of Houston Assocs. Ltd. P'ship)*, 172 F.3d 47 at *3 (6th Cir. 1999) (stating that a plan is akin to a contract between a debtor and its creditors).

The debtors' argument that their plan modifies Green Tree's claim is not supported by the clear unambiguous terms of the plan. The plan provides for current payments to be made to Green Tree outside the plan and for payment of its arrearage inside the plan. This is the standard treatment for home mortgages in chapter 13. The plan does not extend (or even mention) the balloon payment date and is otherwise silent as to Green Tree. *Compare City Bank & Trust Co. v. Glenn (In re Glenn)*, 173 F.3d 428 (6th Cir. 1999) (affirming confirmation of a chapter 13 plan which specifically provided for the extension of a balloon payment date under § 1322(c)(2) by providing monthly payments to the secured creditor for the duration of the plan with the balloon payment to be paid in the 60th month of the plan). As such, the plan does not modify the claim of Green Tree to extend the maturity date of the balloon payment.

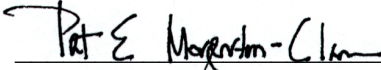
B. Relief from Stay

The debtors have continued to tender their monthly payments, but have not shown that they are able to make the overdue balloon payment. The only argument made by the debtors in opposition to the motion for relief is that the balloon date was extended. As that argument is unavailing, relief from stay for cause is appropriate under the circumstances. *See* 11 U.S.C. § 362(d)(1).

CONCLUSION

For the reasons stated, Green Tree's motion for relief from stay is granted. A separate order will be entered reflecting this decision.

Date: 29 July 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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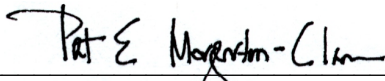


In re:) Case No. 03-18895
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GARY A. DVORSCAK and) Chapter 13
RUTH ANN DVORSCAK,)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the motion of Green Tree Servicing, LLC for relief from stay is granted and the objection is overruled. (Docket 36, 41).

IT IS SO ORDERED.

Date: 29 July 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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