IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-36043

JAMES C. COX
PATSY L. COX

Debtors

MEMORANDUM ON OBJECTION TO CONFIRMATION

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

On April 17, 2002, the court conducted a hearing on the January 22, 2002 Objection to Confirmation filed by A & A Financial Services, Inc. (A & A Financial). A & A Financial, pursuant to various provisions of 11 U.S.C.A. §§ 1322 and 1325 (West 1993 & Supp. 2001), objects to the treatment of its secured claim under the Debtors' Chapter 13 Plan.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(L) (West 1993).

I

The Debtors filed their Chapter 13 Petition on December 7, 2001. A & A Financial asserts a $7,511.33 claim secured by an above-ground swimming pool, accessories, and an alleged second mortgage deed of trust on the Debtors' principal residence (property containing a house, barn, and five acres in Corryton, Tennessee).[1] The Debtors' Chapter 13 Plan, also filed on December 7, 2001, proposed to pay **?**A & A Installation"[2] at a cram-down value of $3,000.00 for a claim secured solely by the above-ground pool. In their Amended Chapter 13 Plan, filed on March 5, 2002, the Debtors propose to surrender the pool to A & A Financial with any deficiency to be allowed as a general unsecured claim. Their Plan makes no mention of, or provision for, A & A Financial's trust deed encumbering the Debtors' residence.

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[1] A & A Financial initially filed a $15,326.69 claim on December 20, 2001. An amended claim, for $7,511.33, was then filed on January 23, 2002.

[2] According to the testimony of Steve Kopman, **?**A & A Installation Co., Inc." (A & A Installation) and **?**A & A Financial Services, Inc." are entities existing under common ownership and operating out of the same location. A & A Installation is in the business of selling and installing swimming pools, while A & A Financial is, predictably, involved in the financing of the pools.

Mr. Kopman apparently is, or has been, an employee of both A & A entities. At the hearing, he identified himself as a loan officer for A & A Financial. However, in a letter to the Debtors dated May 28, 1999, Mr. Kopman's signature appears as the **?**Director of Operations" under the letterhead of A & A Installation. *See* Ex. 10.

According to the Debtors' testimony, they decided to purchase a swimming pool in April 1999 in anticipation of receiving a sizeable Social Security settlement. A representative of A & A Installation subsequently met with the Debtors at their home. A $9,000.00 Sales Contract was signed by the Debtors on April 8, 1999, and approved by A & A Installation on April 9, 1999. The following documents, also bearing the signatures of both Debtors, were introduced into evidence at the hearing:

1. A Credit Application dated April 14, 1999;

2. A Notice of Right to Cancel dated April 8, 1999. This document advises, in its first sentence, that ?[y]ou are entering into a transaction that will result in a mortgage, lien, or security interest on/in your home";

3. An Installment Sale Contract, Note & Disclosure Statement (Note) dated April 14, 1999. The Note provides in material part that ?Buyer shall execute and deliver to Seller a real estate Deed of Trust on the property where improvements will be located . . . "; and

4. A Tennessee Deed of Trust granting A & A Financial a security interest in the Debtors' residence. According to its notarization (done by Mr. Kopman, a notary public), the Deed of Trust was executed on April 8, 1999. According to Mr. Kopman's testimony, however, the instrument was in fact executed on April 14, 1999, and backdated to correspond with the execution of the Sales Contract.

At the hearing, the Debtors generally agreed that their signatures do in fact appear on the above documents.[3] At the same time, the Debtors generally deny signing the papers,[4] insisting that they never intended to grant a security interest in their home. The Debtors further testified that

[3] After comparing these signatures with those appearing on the Debtors' Chapter 13 Petition, the court is satisfied that the signatures are indeed those of the Debtors.

[4] The Debtors offered no plausible explanation of how their signatures might otherwise have appeared on the documentation.

they expressed their desire to pay cash using their anticipated disability settlement and that they would never have knowingly executed a trust deed and note. Conversely, Mr. Kopman testified that he clearly explained each document to the Debtors prior to signing.

The court is unable to fully credit the testimony of any of these three witnesses. The Debtors' recollections are at best unreliable, as they both deny signing numerous documents clearly bearing their signatures. The court approaches Mr. Kopman's testimony with caution as well, particularly in light of his entwined capacities as "loan officer," "director of operations," and notary public. Mr. Kopman's admission that he notarized a document bearing a false date does nothing to bolster confidence in his testimony, nor does his assertion that he read every loan document to the Debtors verbatim.[5]

The court will therefore look to the parties' course of conduct in order to best comprehend the disputed financing arrangement. As noted, Mr. Kopman sent a letter to the Debtors on May 28, 1999. That correspondence provided in material part:

> Since there is a delay in paying for your swimming pool in full, we are starting your payments for the pool, as discussed.
>
> Your first payment is due June 15th, 1999. The monthly amount you owe is $158.38. After 5 days from the 15th a late charge will be assessed of $15.84.
>
> . . . .
>
> When you do receive the settlement, we will deduct the difference from what you have paid.
>
> If you have any questions, please do not hesitate to call.

[5] Mr. Kopman's claim that he read each of these documents aloud (including the two-page Note and the three-page Deed of Trust - each containing an abundance of small-font boilerplate provisions) is utterly implausible.

There is no evidence that the Debtors questioned this letter in any way. Instead, according to Debtor Patsy Cox's testimony, she promptly responded by making the first payment on the Note.[6]

From Mr. Kopman's own letter, it is clear that the Debtors did in fact communicate their desire to pay cash for the pool using their anticipated disability settlement. Similarly, from the Debtors' own actions, it is clear that the parties considered an alternate payment scheme. The court therefore concludes that the Note and Deed of Trust were executed as additional security in the event that the Debtors did not, or could not, pay for the pool in cash. A & A Financial's Deed of Trust is therefore a valid second encumbrance on the residence.

The Debtors claim that they did not understand what they were signing does nothing to alter the court's conclusion. In the absence of fraud,[7] a party cannot avoid a contract that he failed to read, whether due to negligence or inadvertence. *See Richardson v. McGee*, 246 S.W.2d 572, 574 (Tenn. 1952); *De Ford v. National Life & Accident Ins. Co.*, 185 S.W.2d 617, 621 (Tenn. 1945). All parties, regardless of sophistication or ability to read,[8] are under an affirmative duty to obtain a reliable explanation of a contract's terms prior to signing. *De Ford*, 185 S.W.2d at 622 (The failure to do so **?**is such gross negligence as will estop him from avoiding [the contract] on the ground that he was ignorant of its contents.") (citation omitted).

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[6] Mrs. Cox testified that the Debtors made no further payments due to dissatisfaction with the pool's performance.

[7] In their brief, the Debtors allege that they were fraudulently induced to sign the Deed of Trust. At trial, however, they did not produce persuasive evidence that A & A Financial knowingly misled them regarding the execution of the trust deed. *See Lamb v. MegaFlight, Inc.*, 26 S.W.3d 627, 630 (Tenn. Ct. App. 2000) (setting forth elements of fraudulent inducement). The Debtors have accordingly failed to meet their burden of proof on the issue of fraud. *See id.*

[8] According to the Debtors, Mr. Cox cannot read.

The Debtors' other challenges to the Deed of Trust also must fail. The Debtors contend, because the deed and Note bear different execution and payment commencement dates, that the deed's form does not meet the requirements of TENN. CODE ANN. § 66-5-103(4), which provides:

> The following or other equivalent forms, varied to suit the precise state of facts, are sufficient for the purposes contemplated, without further circumlocution:
>
> . . . .
>
> (4) For a deed of trust: "For the purpose of securing to A. B. a note of this date, due at twelve (12) months, with interest from date (or as the case may be), I hereby convey to C. D., in trust, the following property (describing it). And if the note is not paid at maturity, I hereby authorize C. D. to sell the property herein conveyed (stating the manner, place of sale, notice, etc.), to execute a deed to the purchaser, to pay off the amount herein secured, with interest and costs, and to hold the remainder subject to my order."

TENN. CODE ANN. § 66-5-103(4) (1993). The Debtors claim that the Deed of Trust is too indefinite in its description of the corresponding Note and is therefore invalid. The court cannot agree. The Deed of Trust references a $9,000.00, 120-month note between the parties. That is sufficient. *See generally Brown v. Traders Nat'l Bank (In re Spears)*, 39 B.R. 91, 97 (Bankr. E.D. Tenn. 1984) ("Failure to exactly identify the debts secured by a mortgage does not necessarily make the mortgage unenforceable between the parties or as to third parties.").

Lastly, the Debtors argue that the Deed of Trust is invalid between the parties because Mr. Kopman (in his capacity as notary public) was allegedly not present to witness their signatures. The legal merits of this argument need not be addressed because, as previously noted, the court gives little weight to the Debtors' recollections in this matter. In Tennessee, there exists a presumption that the acts of a notary are performed correctly. *See Manis v. Farmers Bank*, 98

S.W.2d 313, 314 (Tenn. 1936); *see also Walker v. Midland Mortgage Co. (In re Medlin)*, 201 B.R. 188, 192 (Bankr. E.D. Tenn. 1996). ?This presumption may be rebutted, but the burden of proof is upon the one denying its correctness." *Manis*, 98 S.W.2d at 314 (citation omitted).

Some representative of A & A Financial was with the Debtors on April 14, 1999, to execute the loan documents. The court has before it no credible evidence that the representative was not in fact Mr. Kopman, and the Debtors have therefore failed to meet their burden on this issue. *See id*.

II

The court must next value the residence to determine the extent to which A & A Financial's claim is secured. Despite paying $40,000.00 in 1996, the Debtors advance an $18,000.00 valuation - less than the amount owed on the first deed of trust.[9] In support of their position, the Debtors cite a $19,600.00 tax appraisal, which is of minimal evidentiary significance. *See Knoxville Housing Auth. v. Bower*, 308 S.W.2d 398, 401 (Tenn. 1957) (?[T]he assessed value of the property . . . is not competent evidence of the market value . . . ."). At the other end of the spectrum, A & A Financial cites a $65,000.00 valuation purportedly provided by the Debtors in their April 14, 1999 Credit Application.

The most reliable valuation comes from a January 29, 2002 appraisal made by Anthony Miller of Milsteads' Appraisal Service. This comparable sales appraisal values the residence at

[9] The parties agree that Lynwood Wagner holds the first lien on the residence. On January 3, 2002, Mr. Wagner filed a $21,390.64 proof of claim.

$31,000.00, including $26,000.00 for the barn and five acres of land and $5,000.00 for the house, which is described by the appraiser as being ?in fair to poor condition." The court finds Mr. Miller a credible witness and accepts his valuation of the Debtors' residence for purposes of the present hearing.

The residence's $31,000.00 value exceeds the amount owed on the first deed of trust by $9,609.36. The Debtors' Amended Chapter 13 Plan fails to provide for A & A Financial's secured claim in the manner required by 11 U.S.C.A. § 1325(a)(5)(B) or (C). Accordingly, A & A Financial's Objection to Confirmation will be sustained. The Debtors will, however, be given an opportunity to further modify their plan to provide for A & A Financial's fully-secured claim.

An order consistent with this Memorandum will be entered.

FILED: April 25, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-36043

JAMES C. COX
PATSY L. COX

Debtors

O R D E R

For the reasons stated in the Memorandum on Objection to Confirmation filed this date, the court directs the following:

1. The Objection to Confirmation filed by A & A Financial Services, Inc. on January 22, 2002, is SUSTAINED. Confirmation of the Debtors' Chapter 13 Plan filed December 7, 2001, as modified by the Amended Chapter 13 Plan filed March 5, 2002, is DENIED.

2. The Debtors will have ten (10) days to move for conversion or dismissal of their Chapter 13 case or to file a modified plan to provide for the fully-secured claim of A & A Financial Services, Inc. Failure of the Debtors to act will result in dismissal of their Chapter 13 case without further notice or hearing.

3. A confirmation hearing on any modified plan filed by the Debtors will be held on May 15, 2002, at 9:00 a.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee. The Debtors will serve notice of the confirmation hearing on all creditors together with a copy of the modified plan.

SO ORDERED.

ENTER: April 25, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE