

ORDERED in the Southern District of Florida on 22 July 2009



A Jay Cristol

**A. Jay Cristol, Chief Judge Emeritus
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

IN RE:

JUAN LeBLANC,

Debtor.

CASE NO. 08-17239-BKC-AJC

Chapter 13 Proceeding

**ORDER DENYING DEBTOR'S AMENDED MOTION TO AVOID LIEN AND
OVERRULING AMENDED OBJECTION TO CLAIM 11-1**

THIS CAUSE came before the Court for a continued hearing on June 25, 2009 at 1:30 p.m. upon the Debtor's Amended Motion to Value Collateral in Plan, Motion to Determine Secured Statuses, and Motion to Avoid Liens ("Motion to Avoid Lien") [D.E. 77] and Debtor's Amended Objection to Claim 11-1 ("Objection to Claim") [D.E. 68]. The parties agreed to limit this preliminary hearing to the issue of whether Creditor Aryelle and Raquel Corp.'s claim is protected from modification by 11 U.S.C. § 1322(b)(2).

After hearing argument of counsel for Debtor, Juan LeBlanc ("Debtor"), and counsel for creditor, Aryelle & Raquel Corp. ("Creditor"), and having reviewed the relevant documents related to these matters, the Court determines that the Creditor's mortgage is not subject to

modification; therefore, with respect to the anti-modification provisions of 11 U.S.C. §1322, the Debtor's Motion to Avoid Lien is DENIED and the Objection to Claim is OVERRULED.

I. Background

The Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(b), and this is a core proceeding pursuant to 28 U.S.C. § 157(b).

On May 30, 2008, the Debtor filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code. Debtor's Schedule A reflects that Debtor resides at and holds title to a condominium located at 555 N.E. 123rd St., Unit 411, Miami, Florida more completely described as Unit 411-B of Leeward Condominium, a condominium according to the Declaration of Condominium thereof, as recorded in Official Records Book 8291, Page 999, of the Public Records of Miami-Dade County, Florida (the "Unit"). Debtor claimed the Unit as exempt in his Schedule C. Debtor's Schedule B reflects furniture and household goods of \$1,100.00

On October 20, 2008, Creditor filed its proof of claim [11-1] reflecting a claim secured by the Debtor's principal residence and homestead valued at \$128,000.00, consisting of an arrearage of \$9,436.74, a secured claim in the amount of \$128,479.10, and an unsecured claim in the amount of \$12,150.00 ("Claim 11-1"). The claim is based on a purchase money mortgage (the "Mortgage") dated May 22, 2006 in which the Debtor is the mortgagor and the Creditor is the mortgagee. The Mortgage was recorded on June 8, 2006 in Official Records Book 24606 at page 1820 in the Public Records of Miami-Dade County, Florida, and provides, in pertinent part:

3.1 To secure payment to Mortgagee of the indebtedness principal with interest and all other sums provided for in the Note and this Mortgage, and performance by Mortgagor of its obligations under this Mortgage, Mortgagor hereby grants, bargains, sells and conveys to Mortgagee, a mortgage lien in and to the following described property:

3.1.1 Unit 411-B of Leeward Condominium, a condominium according to the Declaration of Condominium thereof, as recorded in Official Records Book 8291, Page 999, of the Public Records of Miami-Dade County, Florida (the "Property").

3.1.2 All buildings and improvements now or hereafter located in or on the Property (the Improvements)

3.1.3 All tenements, hereditaments, easements, appurtenances, rights, and privileges now or hereafter pertaining to the Property or the improvements, including all rents, issues, and profits thereof (the Appurtenances); and

3.1.4 All furniture, fixtures, and equipment, now or hereafter owned by the Mortgagor and located on, or used or intended to be used in connection with the Property or the Improvements, including all gas, electric, water, heating, ventilating, air conditioning, cooking, refrigerating, plumbing, and irrigating systems, and all controls, ducts, conduits, and machinery relating thereto. Whether detached or detachable and irrespective of the manner of attachment, the foregoing shall be deemed fixtures for the purposes of this Mortgage and the Uniform Commercial Code (the Fixtures); . . .

3.1.5 All of the foregoing are collectively referred to as the Property.

The Mortgage further states:

5.4 Mortgagor shall keep the Improvements, Fixtures, and Personal Property insured by a company or companies approved by Mortgagee against loss by fire, windstorm, and extended coverages, for the highest insurable value so that Mortgagee's interest is not subject to coinsurance . . .

The Debtor filed a Motion to Avoid Lien and an Objection to Claim seeking to modify the terms of Claim 11-1 and essentially "strip" the lien asserted in Claim 11-1. Debtor argues that the claim is excepted from the anti-modification provision contained in 11 U.S.C. §1322(b)(2) as it is secured by a security interest in property *other than* real property which is the Debtor's principal residence. The Creditor disagrees, contending the "other" property is incidental to the real property and *de minimus* in value. The Creditor argues that its claim is subject to section 1322(b)(2) and is therefore protected from modification.

II. Analysis

The issue before this Court is whether 11 U.S.C. §1322(b)(2) applies to protect Claim 11-1 from modification under the facts of this case. Section 1322(b)(2) states in relevant part as follows:

(b) Subject to subsection (a) and (c) of this section, the plan may -

(2) modify the rights of holders of secured claim, other than a claim secured only by a security interest in real property that is the debtor's principal residence

While it is undisputed that the real property at issue is the Debtor's primary residence, the Debtor argues that the claim is not subject to the anti-modification provision as it is secured by a security interest in property *other than* real property that is the Debtor's principal residence, to wit, various items of personal property such as furniture. The Debtor relies on the language found in the Mortgage at paragraph 3.1.4:

All furniture, fixtures, and equipment, now or hereafter owned by the Mortgagor and located on, or used or intended to be used in connection with the Property or the Improvements, including all gas, electric, water, heating, ventilating, air conditioning, cooking, refrigerating, plumbing, and irrigating systems, and all controls, ducts, conduits, and machinery relating thereto. Whether detached or detachable and irrespective of the manner of attachment, the foregoing shall be deemed fixtures for purposes of this Mortgage and the Uniform Commercial Code (the Fixtures) . . .

While it is undisputed that the language of the Mortgage does in fact include security other than only the real property that is the Debtor's primary residence, this language alone does not abrogate the protections afforded to the Creditor by 11 U.S.C. §1322(b)(2). In *Rolle v. Chase Manhattan Mortgage Corp.*, 218 B.R. 636, 639 (Bankr. S.D. Fla. 1998), a case with similar facts, wherein the mortgage at issue contained similar language to that referenced in the Mortgage in this matter, the court applied the anti-modification protections afforded by 11 U.S.C. §1322(b)(2) and determined that the secured claim may not be modified despite the reference in the security documents to certain

personal property. Similar to the matter before this Court, the mortgage referenced in the *Rolle* case granted a security interest in “all gas, steam, electric, water and other heating, cooking, refrigeration, lighting, plumbing, ventilating, irrigating and power systems, machines, appliances, fixtures and appurtenances, which now or may hereafter pertain to, or be used with, in, or on said premises even though they be detached or detachable.” Despite the apparent security interest in personal property, the court determined that the anti-modification protections of Bankruptcy Code §1322(b)(2) still applied to prevent modification.

Where a home mortgage recites a security interest in collateral that is incident of the real property securing the mortgage lien, no additional security interest exists and the creditor retains protection against modification. *Rolle*, 218 B.R. at 639. Although the Debtor cites the definitions of “debtor’s principal residence” provided in 11 U.S.C. §101(13A) and of “incidental property” provided in 11 U.S.C. §101(27B) to support his position, the Court believes those definitions support the proposition that the “other” property referred to in the Mortgage is actually considered incidental property. Subsection (B) of §101(27B) includes the term “fixtures” within its definition of “incidental property;” and, the “other” property referred to in the Mortgage, which includes the reference to furniture etc., is considered “FIXTURES” under paragraph 3.1.4 of the Mortgage. Bankruptcy Code §1322(b)(2)’s anti-modification protection remains if a security interest has been granted in additional collateral that is “nothing more than an enhancement which is or can, by agreement of the parties, be made a component part of the real property or is of little or no independent value.” *Id.** This Court therefore concludes that the “other” property to which the

*Contrast this with the ruling of Judge Robert E. Grant in *Matter of Graham*, 144 B.R. 80 (Bankr. N.D. Ind. 1992). In *Graham*, Judge Grant determined that, under Indiana law, a mortgage document that includes other collateral, even if worthless, takes the mortgage out of the anti-modification protection of 11 U.S.C. 1322(b)(2). While this may be the appropriate way to construe the statute, Judge Grant nevertheless cites numerous cases decided the other way.

Debtor refers, specifically the personalty which includes furniture, is an enhancement which is, by agreement of the parties, a component part of the real property.

In addition, the value of the personal property allegedly securing Claim 11-1 is *de minimus* and, as a result, does not serve to except the Mortgage from the Bankruptcy Code's anti-modification provisions. A review of the Debtor's sworn Schedule B reveals that the only personal property owned by the Debtor that could fall under the foregoing provisions consists solely of "furniture and household goods" that the Debtor values at \$1,100.00. Considering that the Debtor's Schedule A values the Debtor's interest in the real property at \$140,000.00, the household goods and furnishings are an insignificant portion of the Debtor's Claim 11-1.

As the court in *Rolle* stated, to permit modification of the Creditor's secured claim under the facts of this case undermines the obvious intent of the statute to prohibit modification of home mortgages under 11 U.S.C. §1322(b)(2). 218 B.R. at 641. "This section's 'secured-only' clause was intended to extend anti-modification protection to home lenders as opposed to other types of creditors who take security interests in personal residences to secure debt unrelated to the purchase of the residence, such as debt incurred for extraneous consumer purchases that also serve as security." *Id.*

Accordingly, it is

ORDERED AND ADJUDGED that, with respect solely to the anti-modification provisions of 11 U.S.C. §1322, the Debtor's Motion to Avoid Lien is DENIED and the Objection to Claim is OVERRULED. Creditor's Claim 11-1 is subject to the anti-modification provisions of 11 U.S.C. §1322.

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Submitted by:

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Attorney Robert J. Edwards shall immediately serve a conformed copy of this Order upon all interested parties and file a Certificate of Service with the Court confirming same.