UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

DAVID P. DeLUCA   Case No. 93-13396 K
JUDITH L. DeLUCA

Debtors

The Chapter 13 Debtors here ask the Court to rule that the protections afforded to a mortgage lender under 11 U.S.C. § 1322(b)(2) do not apply when the loan was a three year construction loan with a "balloon" where the parents of one of the Debtors co-signed the mortgage note, and where the balloon payment is past-due. The Debtors ask the Court to approve a Plan in which they propose to pay the lender certain monthly installments for up to 24 months, at which time they will pay the lender the balance in full either by sale or refinancing of the house, or by a substantial lump sum paydown of the remaining mortgage debt[1] and increasing the monthly payments to retire the balance of the mortgage debt over the remaining life of the 60-month Plan.

The Debtors' requests are denied. The Plan may not be confirmed and the lender must be granted relief from the 11 U.S.C. § 362(a) stay.

The Lender, Plymouth Capital Co., Inc. ("Plymouth") filed both an Objection to Confirmation of the Debtors' Plan and a Motion to Lift Stay to Permit Foreclosure.

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[1]The Debtors claim that they will acquire a $36,000 fund from a former employer's profit sharing plan in October, 1995.

These were heard on January 3, 1994, whereupon Mr. DeLuca testified in support of his and Mrs. DeLuca's Plan.

After hearing said testimony, the Court has serious doubts that this Plan is confirmable over Plymouth's objections based on questions of feasibility. The Debtors' proposals for paying Plymouth's $108,000 debt in full may be too speculative to support confirmation. But the Court finds it unnecessary to rule upon the feasibility objection, for it finds that Plymouth is entitled to the protection of 11 U.S.C. § 1322(b)(2) and has not been so treated under the Debtors' Plan.

One premise underlies the Debtors' argument.[2] They argue that this debt was not "secured only by a security interest in real property that is the debtors' principal residence" (11 U.S.C. § 1322(b)(2)) and that it consequently is subject to being modified by the Debtors' Plan. There are two prongs to this argument. One is that this debt was "secured" also by the personal guarantee (via "co-signing") of Mrs. DeLuca's parents (but not by any lien on the parents' property). The other prong is that that fact, coupled with the fact that this was a three-year "construction loan" or "interim loan" whose term had already fully matured prior to the

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[2]Another -- that Plymouth's taking of a judgment of foreclosure and sale converted this objection from a "mortgage debt" to an ordinary secured debt -- was rejected at hearing. To the extent that that holding was based on *In re Taddeo*, 685 F.2d 24 (2d Cir. 1982) the Court erred. Rather, the appropriate analysis was provided in *In re Seidel*, 752 F.2d 1382 (9th Cir. 1985).

filing of the Chapter 13 case,[3] comprise a totality of circumstances that removes this type of debt from the protections which Congress, in 11 U.S.C. § 1322(b)(2), sought to provide for the long-term home lending industry.

The first prong is rejected. Although the Debtors are correct that a personal guarantee might be said, in general parlance, to "secure" an obligation, the Bankruptcy Code uses very different language, i.e. precise terms of art, to manifest the distinctions. Thus, 11 U.S.C. § 502(e)(1) speaks of "an entity that is liable with the debtor on, *or* that has secured, a claim of a creditor against the debtor," in expressing the distinction between, for example, a co-signer and a surety. Identical language is used in 11 U.S.C. § 509(a). And even within Chapter 13 itself, a similar phrase is used: 11 U.S.C. § 1301(a). Thus the Code distinguishes providing security from a mere undertaking as a co-debtor.

Both the language and intent of 11 U.S.C. § 1322(b)(2) manifest an effort to afford protection to those who enable individuals to own homes. The phrase "secured only by a security

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[3]In fact the Debtors filed an earlier Chapter 13 petition before the balloon payment fell due, but the Court then sustained Plymouth's objection complaining of the Debtors' effort to delay the balloon under their Plan. They withdrew their case. As Plymouth has argued, it would be anomalous for the Debtors to have greater rights by refiling after the balloon became past due than they had before it was due.

interest in real property" does not narrowly <u>pre</u>scribe the class of lenders entitled to protection; rather it broadly <u>pro</u>scribes various categories of lenders from the protections of the provision, such as lenders who take "blanket liens" on the Debtors' possessions, such as on his or her car, as a condition of lending, and providers of commercial loans who take a "collateral security" mortgage on the home of the principal officer or director.[4]

At argument, Debtors appropriately seemed to concede that if a personal guarantee of another alone removes a mortgage debt from the protections of 11 U.S.C. § 1322(b)(2), an interpretive problem is posed as to the many cases in which only one of two spouses filed Chapter 13, in which that Debtor is the sole owner of the real estate, but both spouses are obligated on the note. Were the Courts to adopt the Debtors' arguments in those circumstances, the salutary effects on home lending that Congress sought to achieve in enacting § 1322(b)(2) would be undermined. The Debtors here would have the Court draw the line (between personal guarantees that leave the loan within § 1322(b)(2) and personal guarantees that take the loan outside § 1322(b)(2) at the limits of the immediate "family unit." This would leave husband, wife, and

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[4]The Debtors' argument is not totally without merit. If a provider of a business loan to a small corporation took an unsecured promise from the corporation but no security interest in any assets of the corporation, and as security took only a mortgage on the principal's home, the argument might be persuasive. But that is far from the facts at Bar.

perhaps child on one side of the distinction, but parent on the other (presumably, only if the parent is not residing with the debtor).

There is no need for the Court today to render categorical holdings concerning personal guarantees as security for purposes of § 1322(b)(2), other than to declare that where, as here, a debtor's parents guarantee/co-sign the mortgage loan without granting a lien on their own home, so that the debtor may qualify for a loan to or buy or build his or her own home, the protections of § 1322(b)(2) are not lost to the lender.

The second prong of the Debtors' argument must also be rejected. 11 U.S.C. § 1322(b)(2), unlike § 1322(b)(5), makes no distinction between short-term mortgages and long-term mortgages. 11 U.S.C. § 1322(b)(5) permits a debtor to de-accelerate and cure defaults on any instalment debt on which the last payment is due after the term of the Plan will be completed. The Debtors cite *United Companies Fin. Corp. v. Brantly*, 6 B.R. 178 (Bankr. N.D. Fla. 1980), in which the Court stated that § 1322(b) was intended to protect those engaged in "long-term residential financing." The loans in question in that case were largely related to the debtors' business activities (principally raising earthworms, for sale) on their 47 acre parcel of real estate, on only 1.5 acres of which their residence happened to be located. (The residence was valued at $22,160; the farm land at over $79,000.) The notes were for 6.3 years.

That the Court's use of the phrase "long-term" was gratuitous, employed by the Court to describe the earmarks of homestead-related financing, as opposed to "security interests in a residence or homestead to secure non-home financing debts."

It is clear that the three-year mortgage loan presently in question was provided to enable the Debtors to purchase and construct a "kit home," that it was used for that purpose, that the Debtors reside there, and that they knew that they had the burden of obtaining long-term financing before the balloon fell due. To treat this type of homestead-related financing as a matter distinct from longer term financing would certainly be within Congress' authority: but there is no basis to read such distinction into what Congress has thusfar wrought.

This Court is also persuaded by the analysis of these matters, fully explored and resolved in a similar manner by Judge Duberstein in *In re LaBrada*, 132 B.R. 512 (Bankr. E.D.N.Y. 1991).

This Court concludes that the Debtors' Plan may not be confirmed over Plymouth's objection. Confirmation is denied.

As to Plymouth's Motion to Lift the Stay to Permit Foreclosure, brought under 11 U.S.C. § 362(d), the Court notes that the Debtors have had the home listed for sale for three months, thusfar without success. They have sought re-financing as well, also without success. Despite the fact that this is these Debtors' third petition under the Bankruptcy Code in a 21-month period, including a Chapter 7 case in which they were discharged of all

unsecured dischargeable debt on June 15, 1992, as well as the earlier Chapter 13 case described in footnote no. 3, the Court would encourage (but not require) Plymouth to grant the Debtors a reasonable further period to attempt sale or refinancing before any foreclosure sale.

The stay is lifted.

IT IS SO ORDERED.

Dated: Buffalo, New York
January 10, 1994

/s/Michael J. Kaplan
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U.S.B.J.