

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

**TERRANCE & DIANA THAYER,

Debtors.**

Case No. 92-20311

BACKGROUND

On February 6, 1992, the Debtors, Terrance Thayer and Diana Thayer, (the "Debtors") filed a petition initiating a Chapter 13 case. In their schedules, the Debtors listed their residence at 445 Wood Road, Rochester, New York ("Wood Road") as having a current market value of \$100,000. The schedules also indicated that there was a first mortgage (the "GNMA Mortgage") on Wood Road in favor of Government National Mortgage Association ("GNMA") in the amount of \$70,000, but that the amount was disputed. The Debtors' Statement of Financial Affairs indicated that there was a pending GNMA mortgage foreclosure proceeding.

The March 10, 1992 plan filed by the Debtors provided for the payment of \$1500 per month to the trustee for a period of five years and for payments of \$500 per month to be paid to the IRS on arrearages owed to it, \$200 per month to be paid to New York State on arrearages owed to it, \$500 per month to be paid to GNMA on arrearages owed to it (\$30,000 over the five year term of the Plan), and \$300 per month to unsecured creditors.

On March 19, 1992, GNMA filed a secured proof of claim (the "GNMA Claim") alleging that as of February 6, 1992 the Debtors owed \$39,345.73 plus interest at 11.5% per annum from January 1, 1988. The GNMA Claim further indicated that there were arrearages owed consisting of missed payments at \$565 per month from February, 1988, late fees, foreclosure fees and inspection

fees which totalled \$33,122.45. The Court's file does not indicate that an objection to the GNMA Claim was ever filed pursuant to Rule 3007.

After a series of adjourned Section 341 meetings and hearings on confirmation, an order (the "Confirmation Order") confirming the Debtors' plan was entered on August 24, 1992. The Confirmation Order set forth that GNMA had a secured claim in the amount of \$72,468 and that it had arrearages due it of \$33,122.45 which were to be paid through the plan together with a 9% value factor.

By motion returnable November 16, 1992, GNMA moved to terminate the automatic stay so that it could continue its mortgage foreclosure proceeding because of the Debtors' failure to pay the postpetition mortgage payments due from May, 1992 through October, 1992. In an Affidavit filed as part of the GNMA motion, it was indicated that the GNMA Mortgage had a principal balance due of \$39,276.99 and that there was also accrued interest due. However, the Affidavit was left blank as to the amount of the accrued interest. In addition, the cover sheet required by the Court to be filed in connection with the motion to lift the stay showed the amount of mortgages and liens against the property as \$41,500, which happens to be the original November 19, 1979 principal balance due on the GNMA Mortgage. Nowhere in any of the GNMA motion papers was the payoff balance due on the GNMA Mortgage set forth.

On November 10, 1992, the Debtors filed a cross-motion to modify their confirmed plan, which was also made returnable on November 16, 1992. The cross-motion indicated that the Debtors were not in a position to make continuous payments pursuant to the confirmed plan because Terrance Thayer had recently plead guilty to a felony crime and was expected to serve a minimum of one year in prison. The motion alleged that there was substantial equity in Wood Road which was listed for sale and had a market value of approximately \$100,000. The cross-motion requested that

the confirmed plan be modified to authorize the sale of Wood Road and the distribution of the proceeds of sale to the creditors in the order of their priority. The cross-motion, which had a copy of the Confirmation Order attached, did not indicate that there was a continuing dispute as to the amount due on the GNMA Mortgage or that the amount set forth as due to GNMA in the Confirmation Order was incorrect. Nor did the cross-motion request that the Court make any determination or redetermination as to the amount due on the GNMA Mortgage.

The GNMA motion for relief from the stay and the cross-motion by the Debtors to modify the confirmed plan were adjourned to December 7, 1992. On the adjourned hearing date, the Court was advised that the cross-motion had been settled and that a consent order would be submitted. The Court was also advised that a consent order would be submitted on the GNMA motion which would provide that the stay would be lifted unless there was a contract for the sale of Wood Road by June 1, 1993 at a price sufficient to pay off the GNMA Mortgage.

From copies of correspondence filed with the Court, it appeared that on December 9, 1992, January 18, 1993 and March 9, 1993 the attorney for the Debtors forwarded to the attorney for GNMA proposed orders covering both of the settled pending motions requesting that he approve the orders. Apparently there was no response received from the GNMA attorney to these requests. At a March 10, 1993 hearing on a motion by the Chapter 13 Trustee (the "Trustee") to dismiss the Debtors' Chapter 13 case because of the Debtors' failure to make plan payments, which was withdrawn by the Trustee; the Court, at the request of the attorney for the Debtors and the Trustee, indicated that in view of the failure of the GNMA attorney to cooperate in having the consent order entered a proposed order should be forwarded to the Court on five days written notice to the GNMA attorney. A proposed order was forwarded to the Court on March 16, 1993 on written notice to the GNMA attorney. Thereafter, a copy of the Order, consented to by the Trustee and the GNMA

attorney, was received by the Court . The Order which was entered on March 24, 1993 (the "March Sale Order") provided that Wood Road should be listed for sale and remain listed for sale and that if a contract was not obtained by June 1, 1993, the stay would be lifted so that GNMA could go forward with its foreclosure. The Order also provided that in the event of a sale, the net proceeds after the payment of all closing expenses would be deposited with the Court to pay off creditors in accordance with their priority. The introductory recital portion of the March Sale Order indicated that there was \$41,500 owed on the GNMA Mortgage.

By motion returnable July 12, 1993, the Debtors moved for an order authorizing them to sell Wood Road pursuant to an arms length brokered sale purchase contract for \$89,000 (the "Purchase Contract") and directing that the net proceeds derived from the sale be distributed in accordance with the terms of the modified plan as approved by the March Sale Order.

GNMA filed a response to the sale motion opposing it and indicating that the payoff balance on the GNMA mortgage as of June 30, 1993 was \$94,360.50, an amount in excess of the \$89,000 purchase price set forth in the Purchase Contract. The GNMA response further indicated that this balance was made up of principal, interest from February 1, 1988 to June 30, 1993 in the amount of \$20,260.91 and advances for taxes, insurance, property expenses and foreclosure attorney's fees in the amount of \$30,434.89. The GNMA response further explained that the failure of the GNMA attorney to object to the inclusion of the \$41,500 mortgage balance in the recital portion of the March Sale Order was simply an attorney's error, the result of not carefully reviewing the Order.

On July 19, 1993, after hearing the Trustee and the attorneys for the Debtors and GNMA, the Court approved the Debtor's sale motion. A July 29, 1993 Order was entered providing that Wood Road was to be sold pursuant to the terms of the Purchase Contract, GNMA was to be paid \$41,500 plus interest at the rate of 11.5% from March 24, 1993, the Debtors were to pay all closing expenses

associated with the transfer from the sale proceeds, and after deducting the Debtors' homestead exemptions of \$20,000 the balance of any sums on hand were to be paid over to the Trustee to be distributed to creditors.

GNMA appealed the Court's July 29, 1993 Order and has filed a motion for reconsideration of the Debtors' sale motion and for relief from the March Sale Order.

DISCUSSION

Rule 9024 of the Rules of Bankruptcy Procedure makes Rule 60 of the Federal Rules of Civil Procedure applicable under the Bankruptcy Code.¹ After reviewing all of the pleadings and proceedings in this Chapter 13 case, including the papers submitted and the oral arguments made in connection with the pending motion of GNMA; this Court, pursuant to Rule 9024, in the exercise of its discretion and in the interest of justice, concludes that it must modify its July 29, 1993 Order

¹ Rule 60(b) of Federal Rules of Civil Procedure provides: On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

and its March Sale Order to the extent that the March Sale Order is somehow interpreted as a final determination by this Court that the amount due on the GNMA Mortgage as of that date was \$41,500.

The reasons the Court feels it must modify these Orders are as follows:

(1) It is clear that the GNMA attorney made an error in consenting to the March Sale Order which set forth in its introductory recital portion that \$41,500 was owed on the GNMA Mortgage. The attorney for the Debtors acknowledged that he did not obtain this figure from the GNMA attorney, but that he obtained it orally by calling GNMA itself. Notwithstanding that the Debtors had a preconfirmation dispute as to the amounts due on the GNMA Mortgage, the Court agrees with the arguments of GNMA and does not believe that based on all the existing facts and circumstances it was reasonable for the Debtors or their attorney to believe that on March 24, 1993 the GNMA Mortgage balance could have been \$41,500. In August, 1992 the Court had confirmed the Debtors' Plan and found the GNMA Claim to be in excess of \$72,000. The Debtors and their attorney knew that the Debtors had not made any significant payments on the GNMA Mortgage which could have reduced the outstanding balance to \$41,500. In addition, the balance allegedly given to the attorney for the Debtors by GNMA, orally and not in writing, was the original principal balance of the 1979 mortgage. This would be a coincidence which, based on the Debtors' payment history and knowledge that real estate taxes were being paid on Wood Road for a number of years but not by them, could not be reasonably believed. Furthermore, there is no evidence before the Court from any of the pleadings or proceedings in this case that the nature and extent of the preconfirmation or existing dispute that the Debtors have as to the balance due on the GNMA Mortgage is such that the Debtors or their attorney could reasonably have believed in March, 1993 that the outstanding balance on the GNMA Mortgage was in fact \$41,500. Although the Debtors claim that some of their

payments have been misapplied since 1979, because there have been a number of holders and servicers of the GNMA Mortgage, they have never alleged that if such misapplications had been corrected they believed it would have resulted in a total balance due on the Mortgage of approximately \$41,500. Therefore, any reliance by the Debtors or their attorney on the alleged GNMA oral advice or unchallenged recitation in the March Sale Order that the total balance due on the GNMA Mortgage was \$41,500 was not reasonable.

(2) At the time the Court granted the sale motion in July, 1993 on a Chapter 13 hearing day, the Court did not focus on all of the prior proceedings in the case, including that: (a) the Debtors' had scheduled the GNMA mortgage at \$70,000; (b) GNMA had filed a secured proof of claim for in excess of \$70,000 which was not objected to by the Debtors; and (c) the confirmed plan determined that GNMA had a secured mortgage claim for in excess of \$72,000. The Court further did not focus on the fact that the nature and extent of the Debtors' dispute as to the GNMA Mortgage balance could never have resulted in a reasonable belief that the balance was \$41,500 as set forth in the March Sale Order.

In listening to the arguments of the Trustee and the attorney for the Debtors at the July hearing, the Court was left with the following mistaken impressions: the extent of the GNMA Mortgage balance dispute was much greater than it is so that the Debtors could reasonably have believed the GNMA Mortgage balance was \$41,500 in March; the resolution of a dispute regarding the GNMA Mortgage balance had been requested as part of the Debtors' cross-motion, when in fact it was not; a redetermination of the GNMA Mortgage balance at an amount less than determined by the Confirmation Order was essential to the feasibility and approvability of a Modified Plan, when it was not and was at most a collateral issue which would bear on the distribution of any sale proceeds; and the GNMA Mortgage balance set forth in the March Sale Order was intended by all

of the parties, since it was a consent order, to supersede the GNMA Claim and the determination of that Claim by the Court in the Confirmation Order, when it was not. The cross-motion did not request that the Court redetermine the GNMA Claim and the language regarding the balance due on the GNMA Mortgage was not contained in the ordering provisions of the March Sale Order. Therefore, the March Sale Order, which was a consent order, did not result in a finding or determination by this Court that the GNMA Mortgage balance was \$41,500. Furthermore, the redetermination of the GNMA Mortgage balance was not necessary to the feasibility or approvability of the Modified Plan. At the time of the Cross-Motion in December, 1992, the Debtors believed that Wood Road was worth \$100,000. Using the \$72,468 GNMA Mortgage balance determined at the time of confirmation, adding interest at the contract rate and additional real estate taxes GNMA may have had to pay, and deducting anticipated costs of sale and any payments the Debtors made, there still would be excess proceeds available from a sale at \$100,000 by June, 1993 to pay against the Debtors' outstanding personal income taxes scheduled in their Chapter 13 case. This appears to have been the original purpose of and motivation for the cross-motion and proposed Modified Plan when the cross-motion was made.

(3) The Court's records do not show that the Debtors ever filed a formal Modified Plan. To the extent that the March Sale Order is both the Modified Plan and order confirming it, such a Modified Plan, pursuant to Section 1327, is binding on all parties. However, since the Debtors' Cross-Motion did not specifically request a redetermination of the GNMA Mortgage balance, nothing contained in the introductory recital portion of the March Sale Order constituted a redetermination by this Court of the GNMA Mortgage balance for purposes of the Modified Plan.

(4) Because the Court does not believe that any reliance by the Debtors on the \$41,500 GNMA Mortgage balance language contained in the March Sale Order could have been reasonable,

given all of the facts and circumstances of their Chapter 13 case and their mortgage payment history, the Court believes that it would be unjust, notwithstanding the GNMA attorney's mistake which the Debtors and their attorneys must have known was a mistake, to allow the Debtors to profit beyond what they were reasonably anticipating to receive from the sale of Wood Road at the time the cross-motion was made.

(5) There will be no prejudice to the Debtors if the proceeds of the sale of Wood Road are first used to compensate them for a loss they may have incurred in any reasonable reliance on the March Sale Order.

Notwithstanding the Court's belief that reliance by the Debtors or their attorney on the \$41,500 GNMA Mortgage balance contained in the March Sale Order was unreasonable in connection with any prospective distribution of the proceeds of any sale of Wood Road, the Court does believe that the mistake of the GNMA attorney did put acts in motion which GNMA and its attorney are responsible for. Even though GNMA now claims a balance of in excess of \$94,000, clearly Wood Road was sold in reliance on the March Sale Order for an amount of \$89,000, which is not an unreasonable purchase price given the \$72,468 GNMA Mortgage balance determined by the Confirmation Order. Reasonable and necessary expenses have and will be incurred in closing the sale, including attorneys fees and disbursements. In addition, attorneys fees from the date of the March Sale Order through the date of the argument of the pending GNMA motion have been incurred by the Debtors in what the Court believes was reasonable reliance on the March Sale Order and the Confirmation Order. Furthermore, it is alleged by the Debtors that they have incurred actual out-of-pocket expenses in connection with the sale of Wood Road which they would not have incurred but for their reliance on the March Sale Order. The Court believes that the attorneys for GNMA have conceded and agreed that Wood Road must be sold to the innocent third party buyer

for \$89,000 pursuant to the Purchase Contract; that the customary and ordinary expenses of the sale should be paid from the proceeds, including reasonable attorney's fees and disbursements incurred by the Debtors in connection with the sale; and that because of the mistake in the March Sale Order reasonable attorneys fees and expenses incurred by the Debtors through the argument of the pending GNMA motion should be paid from the proceeds of the sale to the extent that all such attorneys fees and disbursements are approved by this Court as reasonable. In addition, the attorneys for GNMA appear to have conceded that the Debtors should also be compensated for any reasonable actual out-of-pocket expenses which they incurred in connection with the sale of Wood Road and in reasonable reliance on the March Sale Order.

CONCLUSION

The Court's March Sale Order is modified to the extent that it is a determination that the GNMA mortgage as of the date of that Order is \$41,500 and the Court's July 29, 1993 Order is modified to provide as follows; it is

ORDERED, that the Debtors are authorized to sell Wood Road to John and Cathleen Anderson for a purchase price of \$89,000, pursuant to the Purchase Contract, a copy of which is attached to the Debtors' June 29, 1993 motion, subject to the terms and conditions of the Purchase Contract; and it is further

ORDERED, that the necessary and customary closing costs in connection with the sale of Wood Road be paid from proceeds, such closing costs to include filing fees, abstract preparation expenses and recording fees, all as approved by the Trustee; and it is further

ORDERED, that GNMA shall deliver a discharge of the GNMA Mortgage in connection with the closing of the sale of Wood Road in consideration of the payment from the proceeds of the

sale of \$41,500 together with interest at the rate provided under the GNMA Mortgage from March 24, 1993 through the date of closing; and it is further

ORDERED, that after the payment of the amounts set forth in the preceding ordering paragraphs, all of the remaining proceeds of the sale of Wood Road shall be paid to the Trustee who shall deposit the same in an interest-bearing bank account subject to the further orders of this Court; and it is further

ORDERED, that the attorney for the Debtors, within ten days of the completion of the closing of the sale of Wood Road, may file an application with this Court for an allowance for the payment of attorney's fees and disbursements incurred in connection with the sale of Wood Road and for representing the Debtors in connection with their Chapter 13 proceeding for the period March 24, 1993 through August 16, 1993; and it is further

ORDERED, that the attorney for the Debtors shall provide a copy of the application for an allowance provided for in the preceding ordering paragraph to the Trustee and the attorney for GNMA, who shall each have ten days from the receipt of their copy of the application to file with the Court and the attorney for the Debtors any written objections to the allowance requested in writing; and it is further

ORDERED, that within ten days of the completion of the sale of Wood Road the Debtors shall file with the Court, the Trustee and the attorney for GNMA, a detailed and itemized list, with copies of receipts and proofs of payment, for all out-of-pocket expenses which they claim they incurred in connection with the sale of Wood Road; and it is further

ORDERED, that within ten days from the receipt of their copy of the Debtors' list of expenses provided for in the preceding ordering paragraph, the Trustee and the attorney for GNMA

shall file with the Court and the attorney for the Debtors any written objections to such claimed expenses; and it is further

ORDERED, that within fifteen days of the date of this Order, or such further time as allowed by the Court, GNMA shall file with the Court, the Trustee and the attorney for the Debtors a detailed and itemized written accounting of all payments made on the GNMA Mortgage and of all expenses or other charges alleged to be able to be added to the Mortgage pursuant to its terms and conditions; and it is further

ORDERED, that the Court shall determine the GNMA Mortgage balance for the purposes of further distribution of the sale proceeds of Wood Road based on the GNMA accounting, or after a hearing if the Trustee or the attorney for the Debtors object to the accounting in writing within twenty days of the date of their receipt of a copy of the accounting; and it is further

ORDERED, that if the Debtors or the Trustee appeal this Order, no further distributions of the Wood Road sale proceeds will be made to GNMA until such appeal has become final and non-appealable.

IT IS SO ORDERED.

/s/ _____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: August 20, 1993