

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN THE MATTER OF:)
)
DAVID D. GORDON) CASE NO. 04-41571
EDNA M. GORDON)
)
Debtors)

DECISION

At Fort Wayne, Indiana, on December 9, 2005.

A debtor can do a lot of things through a Chapter 11 plan. One thing it may not do, however, is “modify the rights [of a secured creditor holding] a claim secured only by a security interest in real property that is the debtor’s principal residence” 11 U.S.C. § 1123(b)(5). The dispute that is before the court in this case presents the legal issue of whether a property’s status for the purpose of § 1123(b)(5) is determined as of the date petition or as of the date the loan was made. The debtors argue for the earlier date, when the loan was made and the property in question was a rental property. GMAC Mortgage Corporation, which holds the mortgage upon the property arising out of that loan, argues for the later date, the date of the petition when the property constituted a residence. The outcome of this debate will determine whether the case can proceed toward confirmation or whether GMAC’s objections to the proposed disclosure statement should be sustained and confirmation of the currently proposed plan denied.

Choosing between the parties’ differing interpretations of § 1123(b)(5) is an exercise in statutory construction and, as such, must begin with the language of the statute. Landreth Timber Co. v. Landreth, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301 (1985). If the statutory language is clear, the court’s inquiry ends and its role is limited to enforcing the statute as written. Caminetti v. United

States, 242 U.S. 470, 485, 37 S.Ct. 192, 194 (1917).

The meaning of §1123(b)(5) is plain. It speaks in the present tense, objectively, based upon the way things are regarding “real property that is the debtor’s principal residence,” not historically, based upon the way things used to be, or subjectively, based upon what might have been intended. If Congress had wanted the issue to turn on something other than the property’s present use, it would have used language such as “real property acquired to be debtor’s principal residence” or “real property that was debtor’s principal residence at the time the lien was granted.” It did not. Moreover, the fact that it did not is hardly surprising, since the filing of the petition is an event of major significance and many rights are determined as of or in relation to it. For example, property of the estate is determined as of the date of the petition, 11 U.S.C. § 541, as is the amount due creditors, 11 U.S.C. § 502(b), a debtor’s right to claim exemptions, 11 U.S.C. § 522(b)(2)(A), the scope of any discharge, 11 U.S.C. § 524(a), the rights and powers of the trustee, 11 U.S.C. § 544(a) and transfers that may be avoided 11 U.S.C. §§ 547(b)(4); 548(a)(1). So, there is nothing out of the ordinary in using the date of the petition as the operative date for determining whether property constitutes the debtor’s principal residence.

Although the court is not aware of any decisions addressing this issue in the context of § 1123(b)(5), there is an identical provision in Chapter 13 which has been part of the current Bankruptcy Code since its adoption in 1978. See, 11 U.S.C. § 1322(b)(2). Given that the language of the two sections is identical, the court can look to decisions applying §1322(b)(2) to assist in the application of §1123(b)(5). While the reported decisions are not unanimous in their conclusions – so that debtors’ position is not without support – the vast majority of courts to consider the issue have determined that the operative date for the purposes of §1322(b)(2) is the date of the petition and

not some other date, such as when the loan was made. See, In re Jordan, 330 B.R. 857, 860 (Bankr. M.D. Ga. 2005); In re LeBrun, 185 B.R. 665, 666 (Bankr. D. Mass. 1995); In re Wetherbee, 164 B.R. 212, 215 (Bankr. D. N.H. 1994); In re Churchill, 150 B.R. 288, 289 (Bankr. D. Me. 1993); In re Boisvert, 156 B.R. 357, 358 (Bankr. D. Mass. 1993); In re Amerson, 143 B.R. 413, 416 (Bankr. S.D. Miss. 1992). Contra, In re Smart, 214 B.R. 63 (Bankr. D. Conn. 1997); In re Hildebran, 54 B.R. 585 (Bankr. D. Ore. 1985). Consequently, they support the court's reading of § 1123(b)(5) and are entirely consistent with it.

The court holds that whether real property constitutes the debtor's principle residence for the purposes of §1123(b)(5) is determined as of the date of the petition. GMAC's objections to the proposed disclosure statement should be sustained and confirmation of the currently proposed plan denied. An order doing so will be entered.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court