

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

JANINE PARKER

Case No. 03-13899-MAM-13

Debtor.

**ORDER DENYING DEBTOR'S MOTION FOR A DETERMINATION THAT
SHE HAS AN INTEREST IN A LAND INSTALLMENT CONTRACT
THAT MAY BE TREATED IN HER BANKRUPTCY CASE**

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James G. Curenton, Jr., Fairhope, Alabama, Attorney for Triple S Ventures

This case is before the Court on Janine Parker's motion for a determination that she has an interest in a land installment contract held by Triple S Ventures that may be treated in her chapter 13 plan. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2) and the Court has authority to enter a final order. For the reasons indicated below, the Court concludes that Janine Parker's motion for a determination that she has an interest in a land installment contract held by Triple S Ventures that may be treated in bankruptcy case should be denied.

FACTS

The debtor, Janine Parker, lives on property in Baldwin County, Alabama consisting of three separate parcels of land located adjacent to the intersection of County Road 55 and John Bauer Road. These parcels are known as Lots 5, 6, and 7 of the Bauer Estates. On April 21, 1994 Ms. Parker entered into a land installment contract (commonly known as a "land sale

contract” or a “bond for title” in Alabama) with Gary D. Skipper for the purchase of Lot 5.¹ Under the contract, Ms. Parker was obligated to pay the \$21,536.16 purchase price in monthly payments of \$207 each at an interest rate of ten percent per year. If Ms. Parker failed to make any of the monthly payments within 30 days of the due date, Mr. Skipper had the right to declare the contract null and void and retain all of her prior monthly payments as liquidated damages. Mr. Skipper subsequently assigned Ms. Parker’s land installment contract to Triple S Ventures (“TSV”), which he owns.

Ms. Parker did not make all of her monthly payments on a timely basis as required by the contract. TSV responded by asserting its right to declare the contract null and void. Ellen Yetter, TSV’s record keeper, testified that during the period from July 7, 1994 through November 18, 2002 TSV sent 13 separate notices to Ms. Parker stating that the contract was null and void. TSV’s usual practice was to make payment arrangements with Ms. Parker after she received a null and void notice. Ms. Yetter testified that TSV accepted late payments (which included a late fee) after each of the first 10 null and void notices were mailed to Ms. Parker. However, she stated that TSV did not make any arrangements with Ms. Parker or accept any late payments after the last 3 notices were mailed to Ms. Parker.

TSV submitted the last three notices it mailed to Ms. Parker into evidence. The first notice of this group, dated October 4, 2002, states that the contract is null and void. It requests that Ms. Parker vacate Lot 5. The second notice, dated November 4, 2002, also states that the

¹ Ms. Parker’s husband, Karl Parker, had previously entered into the same contract with Mr. Skipper on April 17, 1993. Ms. Parker testified that the 1994 contract simply transferred the obligation to pay under the contract over to her. Additionally, she testified that the Parkers began making payments on the property in 1992, before either of them had signed a contract.

contract is null and void. However, it gives Ms. Parker the option to fulfill her obligations under the contract by making arrangements to pay the entire remaining balance due on Lot 5 within 10 days. The third notice, dated November 18, 2002, again states that the contract is null and void. It states that Ms. Parker has 10 days to vacate the property and does not offer any repayment options.

Ms. Parker did not pay the entire remaining balance on Lot 5 or vacate the property. Instead, her husband, filed a chapter 13 bankruptcy case in this Court on December 27, 2002 and listed Lot 5 as property of the estate. TSV filed a motion for relief from stay in Mr. Parker's chapter 13 case on May 23, 2003. The Court orally granted TSV's motion as it related to Lot 5 on July 2, 2003. It found that Lot 5 did not qualify for co-debtor protection in Mr. Parker's case because any interest in it belonged solely to Ms. Parker. An order granting TSV's motion was entered on July 15, 2003.

Ms. Parker filed a chapter 13 bankruptcy case in this Court on July 10, 2003. She listed Lot 5 as property of the estate in her case. Ms. Parker's confirmed chapter 13 plan proposed to make direct payments to TSV outside of the plan. However, TSV did not receive notice of her bankruptcy filing because Ms. Parker listed an incorrect address for TSV on the creditor matrix filed in her case.²

Unaware of Ms. Parker's bankruptcy filing, TSV sent a letter to Ms. Parker dated August 28, 2003, stating that she had 10 days to vacate Lot 5 because the Court had granted TSV's motion for relief in her husband's bankruptcy case. Shortly thereafter, in September 2004, Ms.

² At the February 20, 2004 hearing, Ms. Parker's counsel argued that he correctly listed TSV's address on the creditor matrix. However, he subsequently stated in an email to the Court and opposing counsel that the address listed for TSV in the matrix was incorrect.

Parker made a direct payment to TSV as contemplated in her chapter 13 plan. TSV did not accept the payment but instead forwarded the payment to its attorney. It also sent a letter to Ms. Parker stating that it would not accept any payments on the Lot 5 contract because the property no longer belonged to Ms. Parker. Nonetheless, Ms. Parker remitted two additional payments to TSV on the Lot 5 contract. They were both rejected by TSV, which sent additional letters to Ms. Parker stating that payments would not be accepted because the contract for Lot 5 was null and void.

On January 2, 2004, Ms. Parker filed a motion for a determination that she has an interest in the contract for Lot 5 that may be treated in her bankruptcy case. She states that her confirmed chapter 13 plan provided for TSV to receive direct payments but it has refused to accept them. Ms. Parker requests that the Court enter an order requiring TSV to accept her postpetition payments on the Lot 5 contract. TSV filed a response to Ms. Parker's motion on January 28, 2004. It states that TSV is not bound by Ms. Parker's confirmed chapter 13 plan because it did not receive notice of her bankruptcy filing. Additionally, TSV argues that Ms. Parker has no interest in the Lot 5 land installment contract that may be treated in her bankruptcy case because she defaulted on the contract and any rights she had in it expired prior to her bankruptcy filing.

LAW

Janine Parker seeks a determination that her interest in a land installment contract held by TSV may be treated in her chapter 13 plan. To determine if Ms. Parker may treat this property in her bankruptcy, the Court must first consider whether Ms. Parker had an interest in the contract when she filed bankruptcy. Because state law determines a debtor's property rights in property

of the estate, *Commercial Federal Mortgage Corp. v. Smith (In re Smith)*, 85 F.3d 1555, 1557 (11th Cir. 1996), the Court must look to Alabama state law.

In Alabama, a land installment contract is an executory contract, *Hicks v. Dunn*, 622 So.2d 914, 915 n.1 (Ala. 1993)(stating that “[a] bond for title is an executory contract for the sale of land”), that may generally be assumed or rejected under §365 of the Bankruptcy Code. 11 U.S.C. §365. Sometimes referred to as a “poor man’s mortgage,” Joel R. Donelson, *The Bond for Title: A Modern Look at Alabama’s Land Installment Contract*, 46 Ala. L. Rev. 137, 140 (1994), it is “both a contract for the sale of land ... and a financing device.” *Id.* at 138. In a typical situation, “[t]he vendor retains title to the property and the vendee makes monthly installments of the purchase price and interest once the vendee pays the last installment, the vendor delivers a deed.” *Id.*

Unlike a mortgage, which offers redemption rights to a vendee under Alabama state law, a land installment contract generally does not give any redemption rights to a vendee who has defaulted. *Rogers v. Triple S Ventures*, 752 So.2d 1220, 1222 n.2 (Ala. Civ. App. 1999). Instead, a land installment contract “usually contains a forfeiture clause allowing the vendor to cancel for nonperformance and to keep all of the vendee’s payments as rent.” *Id.* at 140. Although these clauses are enforceable, they are “not favored under the law,” *Green v. Hemmert*, 703 So.2d 391, 396 (Ala. Civ. App. 1997), and courts will allow waiver of strict performance by the vendor to serve as a “remedy for a vendee in default in a land installment contract.” Donelson, *The Bond for Title* at 146.

Waiver under a land installment contract typically occurs when the vendor accepts late payments from the vendee rather than voiding the contract for default. Donelson, *The Bond for*

Title at 146. It is “a question of fact” in each case, *Green* at 396, and “the burden of proving waiver falls on the ... vendee.” Donelson, *The Bond for Title* at 147. This is a difficult burden for the vendee to meet because it must show that it did not have “actual or constructive notice that strict performance [was] necessary” under the contract. *Green* at 396. However, if the vendee meets its burden to show waiver by the vendor, courts “will allow the [vendee] a suit for specific performance” of the contract. Donelson, *The Bond for Title* at 146. This type of suit is “analogous to the mortgagor’s equity of redemption” in Alabama because it requires the vendee to show that “she is ready, willing, and able to perform by offering to pay the balance of the purchase price and interest.” *Id.* at 146-47(citing to *Gay v. Tompkins*, 385 So.2d 973 (Ala. 1980)).

In this case, the land installment contract Ms. Parker entered into with TSV for the purchase of Lot 5 contained a forfeiture clause. It stated:

In the event the Buyer shall make default in any way of the covenants herein contained or shall fail to make the payments aforesaid at the time specified, for a period of thirty (30) days, the time of payments being declared to be the essence of this agreement; then the Seller may declare this contract null and void and all payments made under this contract shall be retained by the Seller as liquidated damages.

Under Alabama state law, this clause was enforceable unless TSV waived strict performance of the contract by accepting late payments. *Green v. Hemmert*, 703 So.2d 391, 396 (Ala. Civ. App. 1997). Ms. Parker bears the burden of proving that TSV accepted late payments and thereby waived its right to declare the contract in default. Donelson, *The Bond for Title* at 147.

It is undisputed that Ms. Parker did not make all of her monthly payments on a timely basis as required by the contract. TSV’s record keeper, Ms. Yetter, testified that during the period from July 7, 1994 through November 18, 2002 TSV sent 13 separate notices to Ms.

Parker stating that the contract was null and void due to Ms. Parker's failure to remit timely payments. She stated that TSV accepted late payments from Ms. Parker after each of the first 10 null and void notices rather than declaring the contract in default. However, Ms. Yetter testified that TSV did not enter into any agreement with Ms. Parker or accept any late payments from her after the last 3 null and void notices were sent. TSV offered Ms. Parker the opportunity to pay the entire remaining balance under the contract in the second of these notices but she did not accept. TSV then mailed her a notice declaring the contract in default.

Ms. Parker testified that rather than paying the entire remaining balance on the contract with TSV, her husband filed a chapter 13 bankruptcy case and listed Lot 5 as property of the estate. This Court subsequently found that Lot 5 did not qualify for co-debtor protection in Mr. Parker's bankruptcy case because it was solely in Ms. Parker's name. It granted TSV relief from the automatic stay to allow TSV to assert its state law contract rights to take possession of Lot 5. However, shortly before the Court entered its order granting relief to TSV, Ms. Parker filed her own chapter 13 bankruptcy case and listed Lot 5 as property of the estate in her case. Her confirmed chapter 13 plan proposed to make direct payments to TSV for Lot 5.

TSV did not object to Ms. Parker's chapter 13 plan because it did not receive notice that she had filed bankruptcy.³ Unaware of Ms. Parker's bankruptcy, TSV sent Ms. Parker a letter demanding that she vacate Lot 5 because this Court had granted TSV's motion for relief in her husband's bankruptcy case. Ms. Parker did not vacate Lot 5. Instead, she sent direct payments to TSV as contemplated by her chapter 13 plan. TSV refused to accept Ms. Parker's payments

³ TSV's mailing address was incorrect on the creditor matrix filed in Ms. Parker's case.

and notified her in writing that no payments would be accepted because her contract to purchase Lot 5 was declared null and void after she defaulted.

The Court finds that Ms. Parker has not met her burden of proof to show that TSV waived its rights under the Lot 5 contract by accepting late payments. Although TSV did accept at least 10 late payments from Ms. Parker after sending her notices stating that the contract was null and void for default, TSV's last 3 notices to Ms. Parker clearly indicated that it would no longer accept any late payments. It offered Ms. Parker the option to pay the entire balance due on the contract but she did not accept. TSV then gave Ms. Parker notice that she had 10 days to vacate Lot 5. These notices were sufficient to give Ms. Parker "actual or constructive notice that strict performance [was] necessary," *Green v. Hemmert*, 703 So.2d 391, 396 (Ala. Civ. App. 1997), under the Lot 5 contract.

TSV's prior acceptance of late payments from Ms. Parker did not act as a waiver of its right to prospectively insist on specific performance of the contract. *Bell v. Coots*, 451 So.2d 268, 270 n.1 (Ala. 1984)("a vendor's acceptance of one or more payments subsequent to the time specified in the agreement does not necessarily waive his right to object to the vendee's delinquency as to future payments, or preclude him from insisting on strict performance in the future and declaring a forfeiture for the vendee's default as to future payments"); *Rogers v. Newton*, 340 So.2d 768, 769 (Ala. 1976)("the mere fact that a seller has permitted the curing of previous defaults is not an end unto itself to cure future defaults of the same nature"). Therefore, because TSV did not waive its right to require Ms. Parker to abide by the forfeiture provisions of the contract, she cannot maintain an action against TSV for specific performance of the contract. Donelson, *The Bond for Title* at 146-47.

Ms. Parker does not have any equitable interest in Lot 5 that may be assumed under §365 of the Bankruptcy Code. Although Ms. Parker cites to the *In re John D. Harris*, Case No. 00-12562-MAM-7 (Bankr. S.D. Ala. October 31, 2000), opinion by this Court for support, her support is misplaced. In *Harris*, the Court found that “[t]he purchaser in an installment land sale contract acquires an equitable interest in the property.” *Id.* However, the Court followed with an immediate caveat, stating that “the obligation of Debtor to pay and the obligation of [the vendor] to deliver title upon completion of payment are dependent and concurrent, so that default in the performance of one excuses the performance of the other.” *Id.* Read together, these findings reveal that a purchaser who enters into an installment land contract does acquire an equitable interest in the property, but only so long as the purchaser performs under the contract. In this case, Ms. Parker defaulted on the contract, which stripped her of any equitable interest in it that could have been assumed in her bankruptcy.

Finally, neither of the Parkers’ bankruptcy filings affected Ms. Parker’s rights under the Lot 5 contract. Although §365 of the Bankruptcy Code generally allows debtors to assume any executory contract in default by curing the default, it is only applicable if there is still something to cure on the date of the bankruptcy filing. Where “a contract provides for termination upon default and the time to cure expires before the bankruptcy, neither can the default be cured nor the terminated contract resurrected or assumed in the bankruptcy.” *In re RB Furniture, Inc.*, 141 B.R. 706, 712 (Bankr. C.D. Cal. 1992)(citing to *In re Sigel & Co., Ltd.*, 923 F.2d 142, 145 (9th Cir. 1991)). Ms. Parker’s rights in the Lot 5 contract expired, at the latest, ten days after she received the November 4, 2002 null and void notice from TSV giving her the option to make arrangements to pay the entire balance due on the contract. Therefore, under Alabama state law,

Ms. Parker had no property rights in Lot 5 that would allow the Parkers to assume the contract with TSV in either of their bankruptcy cases.

IT IS ORDERED that Janine Parker's motion for a determination that she has an interest in a land installment contract held by Triple S Ventures that may be treated in her chapter 13 plan is DENIED. Triple S Ventures is entitled to take immediate possession of Lot 5 of the Bauer Estates.

Dated: March 3, 2004


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE