

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE:)
)
RICKY C. NOLAN,) Case No. 17-03706
)
Debtor.)

ORDER DENYING AMENDED MOTION FOR RELIEF FROM STAY

This matter is before the court on the amended motion (doc. 60) for relief from the automatic stay filed by creditors Charles Robbins and Iva Robbins (collectively, “Robbins”) pursuant to 11 U.S.C. § 362. The court has reviewed the submissions of the parties and heard oral argument. For the reasons discussed herein, the court denies the motion.

Background

In March 2003, the debtor Ricky C. Nolan and Robbins entered into a contract for deed with respect to real property located in Evergreen, Conecuh County, Alabama. The contract also included a 1992 Encore mobile home (collectively with the real property, “the property”). Both parties have submitted copies of the contract (*see, e.g.*, docs. 54-1, 58, and 60-1), and there is no dispute as to its authenticity or applicability. The contract requires Nolan to pay \$40,000 for the home and land: \$3,000 down payment and \$37,000 at 10% interest in monthly installments of \$350.

Since 2003, the property has been Nolan’s principal residence. At some point prior to the bankruptcy filing, Nolan began missing payments under the contract for deed. Robbins’ remedies under the contract upon the occurrence of default purport to convert Nolan’s interest in his homestead to a lease and to allow Robbins to take immediate possession of the property. However, Nolan’s chapter 13 plan (doc. 2) proposes to maintain direct payments to Robbins with respect to the property and to cure any arrearage through the plan.

In the motion before the court, Robbins alleges that Nolan is in pre-petition default under the terms of the contract for deed and that he “currently has pre-petition arrearages of \$14,000.00, plus unpaid late charges of \$1,120.00, and Loss of Timber of \$32,500.00.” (*See* am. mot. for relief from stay 1-2, doc. 60). He further alleges that the payoff on the contract as of the petition date is \$95,940.00.¹ (*See id.* at 2). Robbins seeks relief from stay “to pursue recovery of his property in a State Court unlawful detainer action.” (*See id.* at 1). Nolan’s schedules show that within a year of the petition date, Robbins instituted a state court action against Nolan, but it does not appear that that action reached a conclusion prior to this bankruptcy filing.

Legal Discussion

The issue for the court is whether the contract for deed is a non-executory mortgage (a secured transaction) or a true lease (an executory contract). If it is a mortgage, then Nolan can cure the arrearage through his chapter 13 plan over the life of the plan while maintaining regular payments while the case is pending, which is what he proposes to do. *See* 11 U.S.C. § 1322(b)(5); *see also In re Curtis*, 500 B.R. 122, 126-27 (Bankr. N.D. Ala. 2013). If it is a true lease, then Nolan must assume or reject and must promptly cure (or provide adequate assurance that such prompt cure is forthcoming) all arrearage amounts or lose the property. *See* 11 U.S.C. §§ 365, 1322(b)(7); *see also In re Curtis*, 500 B.R. at 126-27.

The Eleventh Circuit has “tacitly approved” what is commonly referred to as the “functional approach” to whether a contract is executory. *See Thompkins v. Lil’ Joe Records, Inc.*, 476 F.3d 1294, 1306 n.13 (11th Cir. 2007); *see also In re Curtis*, 500 B.R. at 126 n.3. “Under this approach, the question whether a contract is executory is determined by the benefits

¹ Nolan disputes this amount and has objected to Robbins’ proof of claim (claim no. 6). The court is not determining the amount of Robbins’ claim at this time – only whether the contract for deed is a mortgage or a lease as discussed in further detail herein.

that assumption or rejection would produce for the estate.” *In re Gen. Dev. Corp.*, 84 F.3d 1364, 1375 (11th Cir. 1996); *see also Thompkins*, 476 F.3d at 1306 n.13. The court “must take into account that preserving the chapter 13 consumer-[d]ebtor’s residence is of utmost importance to the estate, and to the success of the [d]ebtor’s chapter 13 plan.” *See In re Curtis*, 500 B.R. at 126-27.

Robbins cites the Alabama state court case of *Rogers v. Triple S Ventures*, 752 So. 2d 1220 (Ala. Civ. App. 1998), which involved the issue of what state law remedies are available when a purchaser defaults on an installment contract for sale of land. *Rogers* did not deal with the issue before this court – whether a contract should be treated as a mortgage or a lease in the bankruptcy context. However, the inquiry for this court “should not begin and end with the application of state law, but as emphasized by [the Eleventh Circuit], with the effect that the application of Code § 365 [regarding lease assumption or rejection] would have on the estate, as well the impact on the creditor if its claim were treated as secured.” *See In re Curtis*, 500 B.R. at 127.

The facts of this action are nearly identical to those in *In re Curtis*, and the court is persuaded by the reasoning of the bankruptcy court in that case that it should treat the contract for deed as a secured transaction rather than an executory contract. “Preserving homes is an important and worthwhile function of chapter 13.” *Id.* at 128. Like the *In re Curtis* court, “this [c]ourt is not inclined to recognize the forfeiture provisions in the [contract] that will have the effect of dispossessing the [d]ebtor from h[is] home while [he] remained in possession when h[is] chapter 13 case was commenced and no final judgment for possession has been issued.” *See id.* “Commencing a chapter 13 case on the eve of a mortgage foreclosure stays the sale and allows a debtor a chance to cure the default through plan payments.” *Id.* at 129. “There is no

logical reason the [debtor here] should not have the same opportunity to save h[is] home which remains in hi[s] possession.” *See id.*

As in *In re Curtis*, under the debtor’s plan here, the creditor “will retain the economic benefit of its bargain, although that bargain will be modified to allow the arrears to be paid over the life of the plan.” *See id.* at 129. Robbins “will retain the right to move for stay relief for cause, including lack of adequate protection based on the typical mortgage-asserted grounds of failure to provide insurance or pay taxes, as well as in default in the ongoing payments.”² *See id.* Treating the contract for deed “as a secured claim rather than an executory contract thus preserves the benefit of the bargain for the [d]ebtor, the estate, and the [c]reditor.” *See id.*

A close reading of the contract for deed also supports the court’s holding. *See id.* at 124 (discussing similarities between contract for deed and mortgage and stating that “one is reminded of the anecdote that places considerable weight on waddling and quacking as evidence that the object being scrutinized is likely a duck”). The contract is structured similarly to a typical purchase-money note and mortgage, more so than a simple landlord-tenant lease with purchase option. *See id.* Nolan is obligated to pay the full amount of the purchase price; the contract is not a lease with an option to purchase. The contract grants Nolan the right to possession, obligates him to pay taxes and maintain insurance, and places on him the responsibility for all repairs and maintenance. Upon completion of all payments, Robbins is required to convey the property “by a good and sufficient Warranty Deed” Robbins reserved certain timber rights,

² Robbins did not allege any post-petition deficiency in the motion. His attorney represented that the property is currently not insured, although this issue was not part of the motion. Nolan represented that he would have proof of insurance promptly, and the court reminds him that he must continue to comply with the terms of the contract of deed, including maintaining appropriate insurance on the property.

but he has not argued and the court is not persuaded that this reservation supports a finding that the contract is a lease.

Finally, if Nolan accomplishes what his plan proposes, Robbins “will come out of the bankruptcy whole and in the same position [he] would have been had no bankruptcy intervened: with all arrears cured and [Nolan] on track with the monthly payments, and with no change in” the contract for deed’s maturity date. *See id.* at 129-30. If Nolan “does not perform, the stay can be terminated and [Robbins] may exercise [his] remedies to terminate [Nolan]’s interest in the property and gain possession, including dispossession with the assistance of the state courts.” *See id.* at 130.

Conclusion

To the extent the court has not specifically addressed any of the parties’ arguments, it has considered them and determined that they would not alter the result. Based upon the foregoing, the amended motion (doc. 60) for relief from the automatic stay filed by creditors Charles Robbins and Iva Robbins is denied.

Dated: April 2, 2018


HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE