

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: §
CAROL J. and FRANK W. SOTO, § CASE NO. 96-39060-SAF-13
DEBTORS. §
§

MEMORANDUM OPINION AND ORDER

Ven-Ken, Inc., moves the court for relief from the automatic stay, to allow Ven-Ken to initiate proceedings to have Carol and Frank Soto, the debtors, removed from the subject property, while permitting Ven-Ken to take possession of the property. 11 U.S.C. §362(d)(1). Ven-Ken also seeks reimbursement, under the terms of an agreement, for its legal expenses and attorney's fees. The debtors oppose the motion. The debtors seek: (1) denial of Ven-Ken's motion for relief from the automatic stay; (2) a permanent injunction that prevents Ven-Ken from making any attempts to recover the debtors' property; and (3) an order requiring that Ven-Ken pay reasonable attorney's fees to the debtors' attorney. The court conducted a preliminary hearing on the motion on December 6, 2001.

Ven-Ken owns certain real property described as "Lot 14, Block 3, Phase I, Rancho Villa, an addition in Johnson County,

Texas, according to Plat recorded in Volume 3, Page 70, Plat Records, Johnson County, Texas (the "Property")." On March 18, 1994, Ven-Ken entered into an agreement with the debtors. Pursuant to the agreement, Ven-Ken says it leased the property to the debtors for \$4,680.00. This sum was due in equal monthly installments of \$130.00 beginning April 5, 1994, and payable on or before the 5th of each succeeding month until the end of the agreement. Upon execution of the agreement, the debtors took possession of the property. According to its terms, the agreement would terminate on March 1, 1997.

On December 6, 1996, the debtors filed their petition for relief under Chapter 13 of the Bankruptcy Code. They have made no payments to Ven-Ken since then. On January 10, 1997, Ven-Ken filed a proof of secured claim for \$13,781.81. On November 19, 1997, the debtors filed an objection to Ven-Ken's claim. The debtors requested that the court allow Ven-Ken's claim for \$13,781.81 as a general unsecured claim, since Ven-Ken failed to attach sufficient and/or legible documents to evidence either a perfected lien or a security interest as required by Bankruptcy Rule 3001(d). Alternatively, the debtors asserted that since Ven-Ken had not served the debtors' attorney with a copy of the proof of claim with all the attachments, as required by General Order 93-1, paragraph 7, Ven-Ken's claim should only be allowed as unsecured.

On December 9, 1997, the Chapter 13 Trustee issued a notice of hearing regarding the debtors' objection to claim, as well as confirmation of the debtors' final Chapter 13 plan. The notice indicated the time and place of the pre-hearing conference, as well the date and time that this court would hear any objections that had not been resolved by the pre-hearing conference. The notice warned that "failure to file and serve a written objection or responses as stated, and failure to attend both the pre-hearing conference and the court's hearing shall constitute a waiver of any objection or response, and judgment shall be entered by default, unless otherwise ordered by the court." The Chapter 13 Trustee sent this notice to all parties in interest. Ven-Ken failed to respond to the debtors' objection to its claim. Moreover, Ven-Ken did not file an objection to confirmation of the debtor's Chapter 13 plan.

On January 27, 1998, this court entered an order on debtors' objection to claims. This court ordered that Ven-Ken's claim would be allowed as an unsecured claim for \$13,781.81. Also, on January 27, 1998, the court entered an order that confirmed the debtors' final Chapter 13 plan, which treated Ven-Ken's as an unsecured claim for \$13,781.81.

Ven-Ken contends that the lease terminated on March 1, 1997, and since then the debtors' interest in the property, if any, did not remain property of the estate. Therefore, Ven-Ken argues

there is cause to lift the stay to allow it to commence state court proceedings to obtain possession.

The court first addresses the status of Ven-Ken's claim under the Chapter 13 plan. The debtors contend that Ven-Ken's claim was only allowed as an unsecured debt that will be discharged upon completion of plan payments. Consequently, the debtors argue, since Ven-Ken's claim will be discharged, any lien claim that it had against the debtors is unenforceable.

Under 11 U.S.C. §1327 the terms of a confirmed Chapter 13 plan bind the debtor and its creditors. Moreover, upon completion of the plan, 11 U.S.C. §1328 discharges the debt. To prevent this effect, a creditor must object to the confirmation of the plan. The plan cannot modify a claim. The claim allowance is separately determined by a proof of claim and an objection to the claim, with notice and an opportunity to be heard. See In re Howard, 972 F.2d 639, 642 (1992) (determining that, in order to prevent modifications of their rights, creditors must object to confirmation of the debtor's plan; also providing that "a secured creditor with notice that the debtor is objecting to its claim must participate in the bankruptcy proceedings to protect its rights"). In this case, the debtors objected to the claim. Despite notice and opportunity to be heard, Ven-Ken failed to respond to the debtors' objection to its claim. Ven-Ken also failed to object to confirmation of the

debtors' Chapter 13 plan. Therefore, the allowance of the claim as a general unsecured claim and the confirmed plan are binding. See Howard, 972 F.2d at 639 (holding that if a debtor has filed an objection to a creditor's claim [which the creditor fails to respond to] then a Chapter 13 plan which purports to either reduce or eliminate a creditor's secured claim is res judicata as to that creditor); see also Eubanks v. F.D.I.C., 977 F.2d 166, 174 (5th Cir. 1992) (determining that an order confirming a plan precluded the litigation of issues that either were provided for or should have been provided for under the confirmed plan).

The court notes that Ven-Ken appears to have had a good reason not to respond to the objection to claim. The parties' written agreement, attached to the motion to lift stay, does not purport to be a secured transaction.

Therefore, Ven-Ken does not hold a secured claim and the unsecured claim will be discharged if the debtors complete their plan. But, while that might resolve monetary collection efforts by Ven-Ken, it neither resolves nor addresses the rights to possession of the property.

Ven-Ken asserts that the parties entered into a leasing agreement that terminated on March 5, 1997. But, Ven-Ken's proof of claim states that the agreement is a "lease to purchase real estate." The debtors assert, accordingly, that the parties entered into a contract for deed. Although this is a bankruptcy

proceeding, state law governs the disposition of the property.

See Butner v. United States, 440 U.S. 48, 54-56 (1979)

(explaining that property interests are created and defined by state law, and "unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding"). Moreover, Ven-Ken and the debtors both agree that the determination of rightful possession is controlled by state law.

In Texas, contracts for deed generally provide that upon making a down payment, the vendee is entitled to immediate possession of the property and obtains an equitable right in the property. Payments are often made in installments over a period of time. As long as the vendee performs under the contract he retains his equitable right in the property. Stinnette v. Mauldin, 251 S.W.2d 186, 203 (Tex. Civ. App.--Eastland 1952, writ ref'd n.r.e.). Upon completion of his performance under the contract, the vendee automatically receives equitable title to the property, as well as the right to demand conveyance of the property as a matter of law. Jensen v. Bryson, 614 S.W.2d 930 (Tex. Civ. App.--Amarillo 1981, no writ). However, until the vendee has satisfied all of the terms of the contract, the vendor retains both legal and equitable title under Texas law. Johnson v. Wood, 157 S.W.2d 146 (Tex. Comm'n App. 1941, opinion adopted).

In the instant case, the debtors assert that the parties entered into a contract for deed. But, contrary to a typical contract for deed, the document does not contain language involving the conveyance of property in which the vendor "agrees to sell and convey" the property while the vendee "agrees to buy" the property. See 1 Texas Forms Legal & Bus. § 1:106 (Lawyers Coop. Publ'g ed., rev. 2000). Additionally, the contract usually contains language stipulating that upon receipt of all payments the vendor will transfer the pertinent deed to the vendee. In this case, the document contains neither the conveyance language nor the transfer language. To the contrary, the language provides that upon expiration of the agreement, the debtors would "quietly deliver up said premises on the day of the expiration of this lease." The document also refers to the parties as "lessor" and "lessee," while using language more typical of leases.

This court cannot, however, resolve the possession issue on a motion to lift stay. The debtors have approximately three months to complete their plan. Upon doing so, the Chapter 13 case will be complete and the debt to Ven-Ken will be discharged. Subsequently, the Chapter 13 case will be closed, and the parties will be able to proceed in state court to litigate the property right issues. On the other hand, if the debtors fail to make their final plan payments, then the Ven-Ken debt will not be discharged and that, in all likelihood, would resolve the

possession issue. In the event of a discharge, a state court must decide the right to possession or title when payments under the document have not been made, if the state court decides the parties entered a contract for deed, rather than a lease. Ven-Ken, having waited over four years to file this motion, has not established cause to lift the stay three months prior to the scheduled completion of the case.

Neither side is entitled to attorney's fees. Ven-Ken's claim is fixed by prior court order. The debtors did not address either possession or a resolution of the property interests in this case. At the hearing, the debtors recognized that a state court must now determine property rights.

Based on the foregoing,

IT IS ORDERED that cause exists to lift the stay at the anticipated time of the debtors' completion of their Chapter 13 plan and, therefore, the stay shall lift on March 1, 2002.

Signed this _____ day of December, 2001.

Steven A. Felsenthal
United States Bankruptcy Judge