IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

IN RE: WILLIAM & TRECEY STREETER **5:02-bk-15923 E**
CHAPTER 13

ORDER OVERRULING OBJECTION TO CONFIRMATION

On September 5, 2002, the Court heard an Objection to Confirmation of Plan filed by Crossett Paper Mills Employee Federal Credit Union (the "**Credit Union**"). Jeremy Bueker, Esq., appeared on behalf of the Debtors, who were also present. Bruce Switzer, Esq., appeared on behalf of the Credit Union. Lonnie Grimes, Esq., appeared on behalf of the standing Chapter 13 Trustee, Jo-Ann Goldman.

The issue presented in this case is whether a mortgage and security agreement executed in January 2001 granting the Credit Union a security interest in Debtors' mobile home and real property also served as security for loans made in December 2001 and March 2002. The parties jointly introduced the following exhibits: a January 23, 2001 promissory note; a January 23, 2001 mortgage; a January 23, 2001 security agreement; a Certificate of Title to a 1972 mobile home; a December 19, 2001 loan and security agreement with truth in lending disclosure statement; and a March 27, 2002 loan and security agreement with truth in lending disclosure statement. Following oral argument and brief testimony by the Debtor, William Streeter, the parties rested, and the Court took the matter under advisement along with on e evidentiary objection raised by the Credit Union.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(L), and the Court has jurisdiction to enter a final judgment in this case.

FACTS

On January 23, 2001, the Debtors borrowed $13,000.00 from the Credit Union, and executed a promissory note, mortgage and security agreement in connection with the loan. The mortgage gave the Credit Union a security interest in Debtors' real property in Drew County, Arkansas including all existing fixtures and future improvements, structures or fixtures. The security agreement granted the Credit Union a security interest in the Debtors' 1972 mobile home to be located on Debtors' real property. Both the mortgage and the security agreement contain future advance clauses. Specifically, Section 4 of the mortgage states, in part:

> **4. SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows:
>
> . . .
>
> B. All future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt executed by Mortgagor in favor of Lender executed after this Security Instrument whether or not this Security Instrument is specifically referenced. . . . All future advances and other future obligations are secured by this Security Instrument even though all or part may not yet be advanced. All future advances and other future obligations are secured as if made on the date of this Security Instrument. Nothing in this Security Instrument shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.

Section J. of the security agreement provides:

> That this Agreement and the Security Interest herein granted shall also secure all extensions and renewals of the aforesaid indebtedness and all future advances made by the Secured Party to the Debtor; and said Security Interest shall secure any and all other indebtedness of whatever kind the secured party may hold against the debtor during the effective period of this security agreement.

On December 19, 2001, the Debtors' borrowed $4,297.92 from the Credit Union. Section four of the Loan and Security Agreement documenting the loan provides, in part:

> **4. SECURITY FOR LOAN.** This Agreement is secured by all property described

> in the "Security" section of the Truth in Lending Disclosure. Property securing other loans you have with us also secures this loan, unless the property is a dwelling. A dwelling secures this loan only if it is described in the "Security" section of the Truth in Lending disclosure for this loan. . . .

Likewise, section one of the security agreement executed in connection with the loan provides, in part:

> **1. THE SECURITY FOR THE LOAN** - You give us what is known as a security interest in the property described in the "Security" section of the Truth in Lending Disclosure that is part of this document (the "Property"). . . .

The "Security" section of the Truth in Lending Disclosure executed in connection with the December 19, 2001 loan provides: "Collateral securing other loans with the credit union may also secure this loan. You are giving a security interest in your shares and dividends and, if any, your deposits and interest in the credit union; and the property described below: . . ." No additional property is listed on the December 19, 2001 Truth in Lending Disclosure, but the phrase "SEE CROSS COLLATERAL CLAUSE" is typed in that section next to "Other (Describe)".

On March 27, 2002, Debtors borrowed $4,755.66 from the Credit Union. The Loan and Security Agreement and Truth in Lending Disclosure Statement executed in connection with this loan is identical to that executed in connection with the December 19, 2001 loan. The security section of the Truth in Lending Disclosure Statement also fails to list any specific property securing the loan but again states "SEE CROSS COLLATERAL CLAUSE" next to "Other (Describe)".

On May 28, 2002, the Debtors filed for relief under chapter 13 of the Bankruptcy Code. The Debtors subsequently filed a chapter 13 plan which lists the Credit Union as a fully secured creditor on the January 2001 loan. The plan provides that the Credit Union will retain its lien and be paid the value of its collateral or the amount of the debt, whichever is less, during the life of the plan.

Debtors also list the Credit Union as a nonpriority unsecured creditor.

Separate Debtor, Mr. Streeter, testified that he did not believe the December 2001 and March 2002 loans were secured by his home and real property; he also testified that he did not notice the "SEE CROSS COLLATERAL CLAUSE" language in the Truth in Lending Disclosures. Mr. Streeter testified that he had periodically taken out loans similar to the December 2001 and March 2002 loans before the January 2001 loan. Mr. Streeter referred to these loans as "signature loans," and testified that he had never put any collateral up for these loans.

DISCUSSION

The Credit Union's Objection to Confirmation of Plan raises three objections. First, the Credit Union asserts that it lacks adequate protection for its security interest. Second, it objects to its treatment as a creditor being paid outside the plan. Finally, it objects to its treatment as an unsecured creditor with respect to the December 2001 and March 2002 loans. The Credit Union also objected to the Debtor's testimony to the extent it conflicts with the written documents introduced in evidence. The Court first addresses the Credit Union's evidentiary objection, followed by the Credit Union's objections to Debtors' plan.

A. The Credit Union's Evidentiary Objection.

Where a written contract is clear and unambiguous, parol evidence is not admissible to ascertain the meaning of the contract, and the contract must be construed in accordance with its terms. *See C. & A. Construction Co., Inc. v. Benning Construction Co.,* 256 Ark. 621, 509 S.W.2d 302 (1974) (*citing Miller v. Dyer*, 243 Ark. 981, 423 S.W.2d 275 (1968)). "However, where the meaning of a written contract is ambiguous, parol evidence is admissible to explain the writing." *Id. (citing Brown and Hackney v. Daubs*, 139 Ark. 53, 213 S.W. 4 (1919)). Ambiguities may either

patent (*i.e.*, on its face, the contract omits certain information that the reader must have to determine the parties' intent), or latent (*i.e.,* the ambiguity arises from undisclosed facts or uncertainties regarding the written contract). *Id.* In this case, the Court finds the December 2001 and March 2002 loan documents are ambiguous in that the meaning of the phrase "SEE CROSS COLLATERAL CLAUSE" as used in the loan documents is not defined in the loan documents themselves. Because the Debtor's testimony as to his belief regarding whether his home was put up as collateral for the loans made in December 2001 and March 2002 is relevant to the parties' intent in executing the written documents, and the parol evidence rule does not bar such testimony, the Court overrules the Credit Union's evidentiary objection and considers the Debtor's testimony in reaching its conclusion.

B. The Credit Union's Secured Status.

At hearing, the only issue presented was the Credit Union's status as a secured creditor with respect to the loans made to the Debtors in December 2001 and March 2002. The Credit Union asserts that the mortgage and security agreement securing the January 2001 loan also secures the December 2001 and March 2002 loans due to future advance clauses contained in the January 2001 mortgage and security agreement. The Credit Union argues that the future advance clauses in the January 2001 mortgage and security agreement are effective regardless of the language contained in the December 2001 and March 2002 loan documents. The Credit Union also asserts that the "SEE CROSS COLLATERAL CLAUSE" language in the "Security" section of the Truth in Lending Disclosures serves to secure its loans.

Debtors argue that the December 2001 and March 2002 loans were unsecured according to the terms of the loan documents. Specifically, Debtors rely on section four of the Loan and Security Agreements which provides that the loans are secured by all property described in the "Security"

section of the Truth in Lending Disclosures. Section four specifically states that property securing other loans made by the Credit Union may serve as collateral for the current loan provided the collateral is not a dwelling; if the collateral is a dwelling, it does not secure the current loan unless it is specifically listed in the "Security" section of the Truth in Lending Disclosure. Debtors point out that on the Truth in Lending Disclosures for both the December 2001 and March 2002 loans fails to specifically list the Debtors' property. Debtors further argue that the "SEE CROSS COLLATERAL CLAUSE" language in the "Security" section of the Truth in Lending Disclosures is too vague to be enforceable, and Mr. Streeter testified that he did not even notice the phrase.

Future advance clauses are generally enforceable under Arkansas law. "Parties to a loan transaction may agree that a mortgage given to secure a particular debt may also secure some other existing or future debt." *National Bank of Commerce of El Dorado (In re McMullan)*, 196 B.R. 818, 828 (Bankr. W.D. Ark. 1996) (*citing In re Dorsey Elec. Supply Co.*, 344 F. Supp. 1171, 1172 (E.D. Ark. 1972); *In re Ferguson*, 85 B.R. 89, 91 (Bankr. W.D. Ark. 1988)). It is not disputed that the future advance clauses contained in the January 2001 mortgage and security agreement are valid. However, the Credit Union asserts that the future advance clauses secure the December 2001 and March 2002 loans, regardless of the language contained in the loan documents executed in connection with those loans. The Credit Union specifically relies on that portion of the future advance clause in the mortgage which states that all future advances will be secured regardless of whether that security instrument is specifically referenced or not. The Credit Union further argues that the language referring to a cross-collateralization clause serves to ensure that the future advance clauses secure the subsequent loans.

The Court disagrees with the Credit Union's analysis. To the extent the future advance

clauses conflict with the security clauses in the December 2001 and March 2002 loan documents, the latter controls. The Court cannot give effect to one provision to the exclusion of another or otherwise neutralize a conflicting provision if the provisions may be reconciled. *See Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998) (*quoting RAD-Razorback Ltd. Partnership v. B.G. Coney Co.,* 289 Ark. 550, 556, 713 S.W.2d 462 (1986)). "'The object is to ascertain the intention of the parties, not from particular words or phrases, but from the entire context of the agreement.'" *Id.* Furthermore, ambiguities in a contract are to be construed strictly against the drafter of the contract. *Stacy v. Williams,* 38 Ark. App. 192, 834 S.W.2d 156 (1992). The language in Section four of the Loan and Security Agreement specifically states that if a security interest is to be taken in a dwelling under a previously executed future advance clause, the dwelling must be specifically described in the Truth in Lending Disclosure. The Court must give effect to this provision and find that to the extent the Debtors' property is a dwelling, the future advance clauses contained in the January 2001 mortgage and security agreement do not serve to collateralize the December 2001 and March 2002 loans. Additionally, the references to a cross-collateral clause in the security section of the Truth in Lending Disclosures serve no purpose – there is no clause in any contract executed by the Debtors that is titled "cross-collateral clause." Mr. Streeter's testimony clearly indicates that he did not notice this phrase or otherwise understand that the December 2001 and March 2002 loans were to be secured by his home and real property.

Section four of the Loan and Security Agreements provides, "[P]roperty securing other loans you have with us also secures this loan, unless the property is a dwelling. A dwelling secures this loan only if it is described in the 'Security' section of the Truth in Lending disclosure for this loan . . . ." Accordingly, the Court must determine whether the Debtor's real property and mobile home

is a "dwelling" within the meaning of the loan documents. Because the Credit Union's loan documents are drafted in accordance with the Truth in Lending Act,[1] the Court looks to the Truth in Lending Act to define the term "dwelling." Section 1602(v) defines the term "dwelling" as "a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives." Federal regulations promulgated under the Truth in Lending Act further define the term "dwelling" as "a residential structure that contains 1 to 4 units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence." *See* 12 C.F.R. § 226.2(a)(19). There is no dispute that the Debtors live in the mobile home situated on their real property. Clearly, the definition of "dwelling" under the TILA includes a mobile home whether or not it is attached to real property. In this case, the Debtors' mobile home is attached to real property, and both the real property and the mobile home constitute their dwelling. *See* ROLAND E. BRANDEL, ET AL., TRUTH IN LENDING, A COMPREHENSIVE GUIDE § 4.03[24] (2d Ed. 1994) ("The definition of dwelling under Regulation Z includes all real *and personal* property that is used as a residential structure and that contains one to four units."). *Cf. Gassaway v. Federal Land Bank of New Orleans (In re Gassaway)*, 28 B.R. 842 (Bankr. N.D. Miss. 1983) (Court held that right to rescind under TILA applied where security interest was taken in real property on which debtor's mobile home was located which constituted debtor's principal dwelling.).

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[1]The Truth in Lending Act ("TILA") refers to Title I of the Consumer Credit Protection Act of 1968, 15 U.S.C. § 1601, *et seq.* It was enacted to ensure meaningful disclosures in consumer credit transactions. *See* 15 U.S.C. § 1601. For example, if a creditor acquires a security interest in any property used as the principal dwelling of the person to whom credit is extended, the creditor is required to make additional disclosures, including notification of the consumer's unequivocal right to rescind the transaction within three business days of its consummation. *See* 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(a)(1).

The provisions requiring certain disclosures to be made under the TILA (such as the right to rescission) with respect to a borrower's dwelling serve to put borrowers on notice that a security interest is being taken in their home. While the Credit Union may not have been required to define its security interest as it did, and specifically exclude dwellings, it did so and must suffer the consequences for failing to specifically list Debtors' real property and mobile home on the Truth in Lending Disclosures. The Court concludes that the December 2001 and March 2002 loans are unsecured, and accordingly, the Credit Union's objection is overruled.

C. The Credit Union's Other Objections.

Although the only issue argued at hearing was the Credit Union's objection to its treatment as an unsecured creditor, the Court will also address the Credit Union's other objections. The Court finds that the Credit Union is adequately protected under 11 U.S.C. § 1325(a)(5)(B) in that (1) the plan provides that the Credit Union will retain its lien securing its claim for the secured January 2001 loan, and (2) the Credit Union presented no evidence to show that the plan does not propose to pay the Credit Union the value of its claim as of the effective date of the plan. Because the Credit Union is the moving party objecting to the confirmation of Debtors' plan, it has the burden of proof on the issue of whether it is inadequately protected. *See In re Mendenhall*, 54 B.R. 44, 47 (Bankr. W.D. Ark. 1985) ("Consistent with *In re Hines*[, 723 F.2d 333 (3rd Cir. 1983)], the Court finds that if 11 U.S.C. § 1325 places any burden on the debtor, it is the burden of coming forward with evidence to rebut any evidence introduced in support of an objection by a creditor or the Chapter 13 trustee.").

Finally, the Credit Union' s objection to being paid " outside the plan" appears to be misplaced in that the Debtors' plan neither excludes the Credit Union' s secured debt from the plan, nor proposes to have that claim paid directly by the Debtors. The Credit Union' s secured

debt is to be paid by the Trustee as a secured debt not extending beyond the length of the plan.

CONCLUSION

For the reasons stated herein, the Credit Union's Objection to Confirmation is **OVERRULED**.

IT IS SO ORDERED.

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HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATED:_____

cc: Mr. Jeremy Bueker, attorney for Debtor
Mr. Bruce Switzer, attorney for the Credit Union
Ms. Jo-Ann Goldman, Chapter 13 Trustee
U.S. Trustee