

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE: ROY AND SUSAN CREWS,

Debtors.

CASE NO. 4:04-bk-14692M
CHAPTER 13

ORDER

On April 16, 2004, Roy and Susan Crews (“Debtors”) filed a voluntary petition for relief under the provisions of chapter 13. Genitta Pettit was listed as a creditor holding a first lien on the Debtors’ residence located at 7414 Centennial Road, Jacksonville, Arkansas. The amount of the claim is listed at \$6031.00 and the value of the residence is \$25,000.00.

The Debtors’ plan proposes to pay the debt on the residence in full over the 36-month life of the plan. The debt will be defrayed by a payment of \$191.00 a month, which includes interest at the rate of 8.5% per annum on the unpaid principal. The plan does not provide for payment of any arrearage on the claim. No objection to the plan was filed, and the Court confirmed the plan by order entered June 4, 2004. The order confirming the plan was not appealed.

On June 12, 2005, Ms. Pettit, as Executrix of the Estate of Kenneth Allison Ryan, filed a motion for relief from the automatic stay on the grounds that the Debtors failed to maintain insurance on the property as required by the contract for the sale of the residence.

A hearing was held in Little Rock, Arkansas, on February 11, 2005, and the matter was taken under advisement. Counsel for both parties were asked to furnish briefs, but on this date

none has been filed. This proceeding is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(G), and the Court has jurisdiction to enter a final judgment in this case.

FACTS

The Debtors entered into a contract with Kenneth Ryan for the purchase of the property in question in 1994 for the sum of \$26,000.00. The property is the Debtors' residence. The contract called for a down payment of \$1000.00 and monthly payments of \$254.98 per month beginning May 20, 1994, with interest accruing at the rate of 8.5% per annum. Monthly payments commenced in 1994 and were scheduled to continue for 14 years. The contract also required the buyer to purchase insurance for "fire and extended coverage" in the sum of \$24,000.00 to protect the seller's interest. (Movant's Ex. 1.) The buyers were to receive a deed to the property when they completed all payments.

Debtor Roy Crews testified that he and his wife were friends with Kenneth Ryan. He stated that after he entered into the contract with Ryan, he consulted with three different insurance companies, each of which informed him that the house could not be insured in its present condition. The Debtor stated that he was financially unable to perform the necessary repairs to obtain insurance. He said that when he informed Ryan the house was not insurable, Ryan told him, "not to worry about it, that he couldn't get it [insurance on the house] either." (Tr. at 11.)

The Debtor stated that he made payments under the contract to Ryan for eight years before Ryan's death about two years ago. He said that when Ryan died, he owed 24 months

more in payments¹ and that he began making payments to Ms. Pettit in 2002. The Debtor testified that last year, Ms. Pettit wrote him a letter that stated “she was taking the place back because I didn’t have insurance on it.” (Tr. at 12.) He stated that he filed bankruptcy as a result of Ms. Pettit’s letter, that he intends to pay her in full, and that his chapter 13 plan payments are current.

Ms. Pettit testified that she is the special administrator for the estate of her deceased father and that she and her son inherited the property. She stated that she learned that the property was not insured when she became the special administrator. She seeks to enforce the insurance provision because in the event of a fire loss, her son “gets nothing.” (Tr. at 16.) Ms. Pettit stated that she has not inquired about the purchase of insurance to protect the seller’s interest. She further testified that she wrote the Debtors in March 2004 to inform them that they had until May 5, 2004, to vacate the premises if they did not get insurance.

DISCUSSION

The Debtors’ counsel argued in his opening statement that because the creditor did not object to confirmation, the issue of insurance may not now be raised because of the principle of res judicata. The creditor’s counsel argues that Ms. Pettit is entitled to relief from the automatic stay because her security interest is not adequately protected.

¹ This testimony conflicts with the documentary evidence that the Debtors contracted to make 168 monthly payments for a period of fourteen years. See Movant’s Exhibit 1.

The Bankruptcy Code provides the following:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest . . .

11 U.S.C. § 362(d)(1)(2000).

In this jurisdiction, failure to maintain insurance required by a contract for the sale of real property has almost always been determined to be cause for relief from the automatic stay because of lack of adequate protection. The plan makes no provision with regard to the insurance requirement; therefore, lack of insurance was not a confirmation issue and res judicata has no application.

However, the Court's opinion is that Ryan's failure to enforce the insurance requirement for over ten years constitutes a waiver under state law. A waiver is the voluntary abandonment or surrender by a capable person of a known right with the intent to be forever deprived of its benefits. Jackson v. Swift-Eckrich, 830 F.Supp. 486, 495 (W.D. Ark. 1993)(quoting Bethell v. Bethell, 268 Ark. 409, 420, 597 S.W.2d 576 (1980); Bright v. Gass, 38 Ark. App. 71, 77, 831 S.W.2d 149 (1992)), aff'd, 53 F.3d 1452 (8th Cir. 1995); Bharodia v. Pledger, 340 Ark. 547, 555, 11 S.W.3d 540, 545 (2000)(citing Pearson v. Henrickson, 336 Ark. 12, 983 S.W.2d 419 (1999)).

A party to a contract who, with knowledge of a breach by the other party, continues to accept benefits under the contract and permits the other party to continue in performance waives the right to insist on the breach. Jackson, 830 F.Supp at 494-95 (quoting Stephens v. West Pontiac-GMC, Inc., 7 Ark.App. 275, 278, 647 S.W.2d 492 (1983)); Clear Creek Oil & Gas Co.

v. Brunk, 160 Ark. 574, 255 S.W. 7, 8 (1923)(citations omitted); Truemper v. Thane Lumber Co., 154 Ark. 524, 242 S.W. 823, 823 (1922)(citations omitted).

In the instant case, the Debtors cannot obtain the required insurance because of the condition of the property, a fact not disputed by Ms. Pettit. The evidence demonstrates that Ryan was aware the property was uninsurable even before the Debtors attempted to purchase insurance. The fact is not refuted that the Debtors continued to pay and Ryan continued to accept payments under the contract without objection for ten years, despite the lack of insurance.² Clearly, Ryan intentionally and finally waived any objection he may have had with regard to the Debtors' breach.

Alternatively, these facts support a finding that if Ryan were still alive, he would be equitably estopped from terminating the contract now. Four elements are necessary to establish estoppel: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that the conduct be acted upon or must act so that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the facts; and (4) the party asserting the estoppel must rely on the other's conduct and be injured by that reliance. Shelter Mut. Ins. Co. v. Kennedy, 347 Ark. 184, 187, 60 S.W.3d 458, 460 (2001)(citing City of Russellville v. Hodges, 330 Ark. 716, 957 S.W.2d 690 (1997)).

Under the doctrine of estoppel, a person may be precluded by his conduct from asserting a right which he otherwise would have had. Undem v. First Nat'l Bank, 46 Ark. App. 158, 166,

²The Debtor stated without objection "I went back to him and said 'Kenneth, I can't get insurance on it.' He said 'I know it. I couldn't either. Just don't worry about it. Let's just hope it don't burn or blow away.'" (Tr. at 13-14.)

879 S.W.2d 451, 455 (1994) (citing Daves v. Hartford Accident and Indem. Co., 302 Ark. 242, 247, 788 S.W.2d 733 (1990)).

In this case, Ryan was aware the property was uninsurable, did not object to the lack of insurance, offered verbal assurances that the lack of insurance was not an impediment to the contractual relationship, and accepted regular monthly payments under the contract for eight years before he died. The Debtors were unaware that the property could not be insured when they entered into the contract, but upon discovering the facts, the Debtors continued to pay under the agreement in reliance on Ryan's representation that he would not press the issue. The Debtors relied to their detriment on the seller's statements and conduct in that they now have made at least ten years' worth of payments on a 14-year contract. A forfeiture now would result in a substantial loss on the Debtors' investment. By the Court's calculation, after ten years of payments under the contract, the Debtors, if current in their payments, had paid approximately \$15,000.00 in principal, plus a \$1000.00 down payment, and approximately \$16,000.00 in interest on a \$26,000.00 contract.

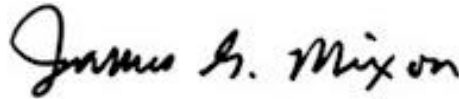
The seller's waiver and/or waiver by estoppel are binding not only on the seller but on his privies by blood, estate or contract. Vaughn v. Dossett, 219 Ark. 505, 510, 243 S.W.2d 565, 568 (1951)(quoting Mason v. Dierks Lumber & Coal Co., 94 Ark. 107, 125 S.W. 656, 658 (1910)). Cf. Hardie v. Estate of Davis, 312 Ark. 189, 197, 848 S.W.2d 417, 421 (Ark. 1993) (decedent's settlement agreement was binding on decedent's heirs since heirs were in privity with decedent); Simmons v. Simmons, 203 Ark. 566, 158 S.W.2d 42, 45 (1942) (heirs of deceased owner of real estate succeeded to only those rights that decedent had in the property).

In the instant case, Ms. Pettit, as the representative of Ryan's estate, is a privy by contract. Thus, she is bound by Ryan's waiver and is estopped in the same manner that Ryan was estopped. Ms. Pettit succeeded to only those rights in the contract that Ryan had at the time of his death, and either intentionally or through estoppel, Ryan had clearly waived his right to assert breach of contract for failure to obtain insurance.

Furthermore, in this case, if the Debtors did suffer a fire loss and ceased paying, their indebtedness is substantially less than the original purchase price, the principal having been reduced by more than \$15,000.00. The remaining indebtedness will still be secured to the extent of the value of the real estate. The creditor, therefore, has adequate protection in the form of the value of the real estate.

Therefore, for these reasons the motion for relief is denied.

IT IS SO ORDERED.



U. S. BANKRUPTCY JUDGE

DATED: 6/16/05

cc: David D. Coop, Chapter 13 Trustee
David Lester, Esq.
Steven R. Smith, Esq.
Debtors