

11 U.S.C. § 506(d)  
11 U.S.C. § 1322(b)(2)

Smithee v. Way, Adv. No. 93-6074  
(In re Smithee), Case No. 692-64463-H13

12/22/93

PSH

Unpublished

Debtors sought to bifurcate homestead mortgage into secured and unsecured claims under Chapter 13 Plan. Bankruptcy court required they file adversary proceeding to avoid unsecured portion of mortgage lien. Meanwhile, U.S. Supreme Court ruled in Nobelman, 113 S.Ct. 2106, that pursuant to 11 U.S.C. § 1322(b)(2) chapter 13 debtors cannot bifurcate undersecured homestead mortgages. On cross-motions for summary judgment, debtors argued creditors' security interest in mobile home (i.e., personal property) precluded protection under § 1322(b)(2) because claim was not secured only by "real property that is the debtor's principal residence."

Held: Facts indicate the mobile home here is "real property" under Oregon law. Therefore § 1322(b)(2) prevents lien-stripping.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

IN RE	)	
	)	
NICHOLAS W. SMITHEE and	)	Case No. 692-64463-H
KARREN M. SMITHEE,	)	
	)	
<hr style="width: 30%; margin-left: 0;"/> Debtors.	)	
	)	
NICHOLAS W. SMITHEE and	)	
KARREN M. SMITHEE,	)	
	)	
Plaintiffs,	)	
vs.	)	Adversary No. 93-6074-H
	)	
RONALD WAY; WESLEY WAY;	)	
KENNETH WAY and STEPHEN WAY,	)	
	)	MEMORANDUM OPINION
<hr style="width: 30%; margin-left: 0;"/> Defendants.	)	

This matter is before the court on cross-motions for summary judgment. There are no material issues of fact outstanding; therefore the case may be decided on the motions. The plaintiffs, Chapter 13 debtors (hereinafter "debtors"), seek to avoid a mortgage lien on their residence under 11 U.S.C. § 506(d),<sup>1</sup> except to the extent of the amount of the defendants' secured claim.

I. FACTS

<sup>1</sup> All statutory references hereinafter are to the Bankruptcy Code, 11 U.S.C. § 101 et seq., unless otherwise indicated.

1 In March of 1990, the debtors purchased from the individual  
2 defendants a parcel of real property located in Coos County, Oregon  
3 and a 1975 Parkway mobile home located thereon, intended by the  
4 debtors to be their principal residence. The debtors  
5 contemporaneously signed an installment note in the amount of \$47,000  
6 payable in 15 years naming defendants as payees. It states:

7 When the unpaid principal balance of this note is reduced to  
8 \$42,000, the mobile home is to be released from the security  
9 for payment of this note.

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11 The note is secured by a trust deed covering the real property and the  
12 mobile home. The trust deed was properly recorded. The defendants  
13 perfected their security interest in the mobile home by notation on  
14 the vehicle's certificate of title.

15 On October 16, 1992, the plaintiffs filed their bankruptcy  
16 petition under Chapter 13. At the time of filing, the mortgage was  
17 undersecured and the debtors were in default on their payments under  
18 the note. The debtors then attempted to reduce the amount secured by  
19 the defendants' lien through the terms of their Chapter 13 plan. This  
20 court ordered that pursuant to Fed.R.Bankr.P. 7001(2) the debtors file  
21 an adversary proceeding requesting lien avoidance under § 506(d).  
22 After the proceeding was filed the parties stipulated to the following  
23 additional facts:

- 24 1. The mobile home is 20 feet wide and 50 feet long.
- 25 2. At some point in time before the debtors purchased the property  
26 from the defendants, the mobile home had been moved onto the real  
property and placed on concrete blocks.
- 27 3. The mobile home originally had axles and wheels on which it was  
28 transported to the real property.

1 4. The axles and wheels were removed when the mobile home was placed  
2 on the concrete blocks, but could be reattached to the mobile  
3 home to remove it from the property, provided the blocks  
4 underneath are removed.

## 5 II. DISCUSSION

6 The defendants argue that because they had earlier been granted  
7 relief from the automatic stay and had begun foreclosure proceedings,

8 [T]he real estate and mobile home are no longer property of  
9 the estate nor is the debt a part of the bankruptcy  
10 proceeding . . . . There is, thus, no need to void any lien  
11 in connection with this property nor is value any longer an  
12 issue. The adversary proceeding is moot. Defendants should  
13 be entitled to summary judgment as a matter of law.

14 Defendants are mistaken. A grant of relief from the automatic stay  
15 does not remove subject property from the bankruptcy estate. As no  
16 foreclosure sale has yet taken place, the subject property is still  
17 property of the estate; thus this court has jurisdiction to determine  
18 the § 506(d) issue. Further, in Oregon, Chapter 13 debtors may cure  
19 their mortgage arrearages through a confirmed Plan at any time prior  
20 to the foreclosure sale and retain their real estate. See In re Hurt,  
21 158 B.R. 154, 160-61 (Bankr. 9th Cir. 1993).

22 On June 1, 1993, just days before the parties filed these cross-  
23 motions for summary judgment, the Supreme Court of the United States  
24 ruled in Nobelman v. American Savings Bank (In re Nobelman), \_\_\_ U.S.  
25 \_\_\_, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993), that if § 1322(b) (2)  
26 applies it prohibits the application of § 506(d) in Chapter 13 cases.<sup>2</sup>

27 11 U.S.C. § 1322(b) (2) states:

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28 <sup>2</sup> Nobelman effectively overruled In re Houglund, 886 F.2d 1182  
(9th Cir. 1989), which previously had allowed such lien-stripping in  
the Ninth Circuit.

1 (b) Subject to subsections (a) and (c) of this section, the  
2 plan may

3 \* \* \*

4 (2) modify the rights of holders of secured claims, other  
5 than a claim **secured only by a security interest in real  
6 property that is the debtor's principal residence**, or of  
7 holders of unsecured claims, or leave unaffected the rights  
8 of holders of any class of claims;

9 (emphasis added).

10 The debtors insist that because the defendants are secured not  
11 only by the real estate but also by the mobile home, § 1322(b)(2) does  
12 not protect the defendants' lien from reduction under § 506(d). Thus,  
13 the issue before the court is whether the debtors' mobile home is  
14 "real property" within the meaning of § 1322(b)(2).

15 Whether property is real or personal in nature is governed by the  
16 applicable state law. In Oregon, except for purposes of registration  
17 and title,<sup>3</sup> when a mobile home and the land upon which it is situated  
18 are owned by the same party, the mobile home is treated as real  
19 property. O.R.S. 308.875 states in relevant part:

20 If the mobile home and the land upon which the mobile home  
21 is situated are owned by the same person, the assessor shall  
22 assess the mobile home as real property. If the mobile home  
23 is owned separately and apart from the land upon which it is  
24 located, it shall be assessed and taxed as personal  
25 property.

26 O.R.S. 310.622 states:

27 A mobile home assessed under the ad valorem tax laws of this  
28 state shall be eligible to be a homestead for the purposes  
of all tax laws of this state giving a right or privilege to  
a homestead. For those mobile homes assessed as real  
property, the mobile home homestead includes land and  
improvements to the same extent that a homestead would be  
recognized if the mobile home were a conventional home.

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3 Although the mobile home here is covered by the trust deed,  
the exclusive means of perfecting a security interest in a mobile home  
under Oregon law is by notation of the security interest on the home's  
title, unless the owners exempt the mobile home from registration as a  
motor vehicle pursuant to O.R.S. 820.510, which is not applicable  
here. See O.R.S. 803.097(1).

1 O.R.S. 23.164(1) also provides that debtors may claim a homestead  
2 exemption in a mobile home and the property upon which it is situated.  
3 The court takes judicial notice that in their bankruptcy schedules the  
4 debtors claimed a homestead exemption in the mobile home. The Oregon  
5 homestead and property tax statutes support a finding that under our  
6 facts the mobile home is "real property" within the meaning of §  
7 1322(b)(2).

8 Here the facts further support this conclusion. The land and  
9 mobile home were purchased by the debtors as one unit as their  
10 principal residence under a 15-year purchase money mortgage. Prior to  
11 the loan, the mobile home was affixed to the land and had lost its  
12 mobility. The security documents do not refer to the mobile home as  
13 personal property.

14 Finally, although the legislative history of § 1322(b)(2) is  
15 sparse it is clear that the protection for residences excepted from  
16 the other terms of that section was included to encourage the flow of  
17 capital into the market for home purchases. See Nobelman, 113 S.Ct.  
18 at 2112 (Justice Stevens concurring). The defendants' loan and  
19 mortgage allowed the debtors to purchase their residence.  
20 Significantly, the bare land alone could not be their residence.  
21 While some courts have stated to the contrary, see United Companies  
22 Fin. Corp. v. Brantley, 6 B.R. 178, 189 (Bankr. N.D. Fla. 1980); In re  
23 Morphis, 30 B.R. 589, 593 (Bankr. N.D. Ala. 1983), there is no  
24 suggestion in the legislative history or the language of § 1322(b)(2)  
25 that the protection for residential lenders is limited to  
26 institutions.

27 The debtors cite several cases for the proposition that security  
28 taken in property other than a principal residence thwarts the

1 protection otherwise available under § 1322(b)(2). In In re Hirsch,  
2 155 B.R. 688 (Bankr. E.D. Pa. 1993), the creditor held security in  
3 addition to the residence consisting of "all improvements now or  
4 hereafter erected on the property and all easements, rights,  
5 appurtenances, rents, royalties, mineral, oil and gas rights and  
6 profits, water rights and stock and all fixtures now or hereafter a  
7 part of the property." In In re Green, 7 B.R. 8 (Bankr. S.D. Ohio  
8 1980), the creditor held additional security in two cars, household  
9 goods and a second mortgage on the debtors' other residential real  
10 estate. In United Companies Fin. Corp. v. Brantley, 6 B.R. 178, 189  
11 (Bankr. N.D. Fla. 1980), the additional security was in an assignment  
12 of a life insurance policy, including any unearned premiums.<sup>4</sup>

13 These cases are distinguishable on their facts. None involve a  
14 security interest in a mobile home which may be considered real  
15 property under the applicable state law and which was the debtors'  
16 principal residence.

17 A number of bankruptcy cases which have addressed the issue of  
18 the applicability of § 1322(b)(2) when a mobile home is additional  
19 security support this court's conclusion.<sup>5</sup> Those cases which have  
20 held that taking a mobile home as additional security placed the  
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25 <sup>4</sup> In In re Ford, 84 B.R. 40 (Bankr. E.D. Pa. 1988), also cited  
26 by the debtors, the court did not actually decide the issue of whether  
27 an additional security interest in rents, profits, and all plumbing  
28 and heating took the mortgage out of the protection of § 1322(b)(2).

<sup>5</sup> See In re Speights, 131 B.R. 205 (Bankr. N.D. Fla. 1991); In re Carter, 116 B.R. 156 (Bankr. W.D. Mo. 1990); In re Plaster, 101 B.R. 696 (Bankr. E.D. Okla. 1989); In re Owens, 36 B.R. 661, 663 (Bankr. M.D. Tenn. 1984).

1 creditor outside the protection of the excepted clause to § 1322(b)(2)  
2 are distinguishable on either the facts or the applicable state law.<sup>6</sup>

3 The debtors' motion for summary judgment is therefore denied.  
4 The defendants' motion for summary judgment is granted. An order  
5 shall be entered accordingly.

6 The court will reset an adjourned confirmation hearing in the  
7 debtors' main case. The debtors shall amend their Plan if necessary  
8 to reflect this ruling. The court also notes the debtors' present  
9 Plan provides for cure of the defendants' arrearages without interest.  
10 The court draws the parties' attention to Rake v. Wade, \_\_\_ U.S. \_\_\_,  
11 113 S.Ct. 2187, 124 L.Ed.2d 228 (1993).

12 An order consistent herewith will be entered.

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15 POLLY S. HIGDON  
16 Bankruptcy Judge  
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23 <sup>6</sup> See In re Blevins, 152 B.R. 130 (Bankr. N.D. Tex. 1992)(land  
24 and mobile home not purchased together; creditor had no security  
25 interest in land; security agreement provided mobile home was personal  
26 property); In re Thurston, 73 B.R. 138 (Bankr. N.D. Tex.  
27 1987)(creditor failed to make appropriate election under Texas law to  
28 treat mobile home as realty at time loan was made); In re Morphis, 30  
B.R. 589 (Bankr. N.D. Ala. 1983)(financing company's 5-year, 2nd  
mortgage covering mobile home and lot not protected by §1322(b)(2)  
because loan was additionally secured by adjoining vacant lot that was  
not the debtors' residence -- alternatively, § 1322(b)(2) only applied  
to long-term home loans); Matter of Colvin, 13 B.R. 521 (Bankr. D.  
Nev. 1981)(security agreement referred to mobile home on leased land  
as personal property).